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v.
Lawrence Epstein, et al.

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2	May 3 1995		Appendix of petitioner filed.
3	May 23 1995		Brief of respondent Walter Minton in opposition filed.
4	May 23 1995		Brief of respondents Lawrence Epstein, et al. in opposition filed.
5	May 24 1995		DISTRIBUTED. June 9, 1995 (Page 4)
6	May 26 1995	X	Reply brief of petitioners filed.
7	Jun 2 1995	G	Motion of Business Roundtable for leave to file a brief as amicus curiae filed.
8	Jun 12 1995		REDISTRIBUTED. June 16, 1995 (Page 15)
9	Jun 19 1995		Motion of Business Roundtable for leave to file a brief as amicus curiae GRANTED.
10	Jun 19 1995		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
11	Aug 3 1995		Brief of petitioners Matsushita Electric Industrial Co., Ltd., et al. filed.
12	Aug 3 1995	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
14	Aug 25 1995		Order extending time to file brief of respondent on the merits until September 15, 1995.
15	Sep 8 1995		Brief amicus curiae of C.L. Grimes filed.
16	Sep 13 1995		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
17	Sep 15 1995		Brief of respondents Lawrence Epstein, et al. filed.
18	Sep 28 1995		CIRCULATED.
19	Oct 3 1995		SET FOR ARGUMENT MONDAY, NOVEMBER 27, 1995.(2ND CASE).
20	Oct 16 1995	X	Reply brief of petitioners filed.
21	Nov 16 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
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23	Nov 27 1995		ARGUED.

Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Matsushita's 1990 acquisition of MCA Inc. gave rise to shareholder class action litigations in Delaware state court and later in California federal district court. The named plaintiffs in both litigations claimed to represent the former shareholders of MCA. The federal district court denied class action status to the federal litigations and entered summary judgment for defendant Matsushita. The parties to the Delaware state litigations negotiated an "opt out" class action settlement providing for the release of all claims, state and federal. A judgment on that settlement was entered by the Delaware Court of Chancery and affirmed by the Delaware Supreme Court. Thereafter, the Ninth Circuit Court of Appeals entertained an appeal from the order dismissing the federal actions sponsored by MCA shareholders who had released their federal claim for consideration pursuant to the Delaware settlement. The court of appeals refused to honor the release and refused to give full faith and credit to the state court judgment. The court of appeals held—contrary to the law of the First and Third Circuits—that state courts lack the power to approve a class settlement releasing exclusively federal claims. This case presents the following questions:

1. Whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement released federal claims.

2. Whether a federal court can automatically imply a private right of action under an agency regulation, here Securities and Exchange Commission Rule 14d-10, on the sole ground that the enabling statute has been held to be privately enforceable.

3. Whether a statutorily-defined tender offer time period, with fixed parameters triggering other statutory regulations, can be judicially expanded to include a transaction that occurred outside the tender offer period.

PARTIES TO THE PROCEEDING

The named plaintiffs in the federal class action, *Epstein, et al. v. MCA Inc., et al.*, No. 92-55675 (C.D. Cal.), are Lawrence Epstein, John Linder, Jane Rockford (as trustee of the Michael J. Rockford Trust), Maurice Karlin, Ruth Karlin, Beth Ann Karlin, and Bert P. Karlin. The plaintiff in *Minton v. MCA Inc.*, No. 92-55632 (C.D. Cal.), is Walter Minton. These two cases were consolidated by the district court and the court of appeals, and they are treated as one case for purposes of this petition. The defendants in both actions are MCA Inc., Matsushita Acquisition Corporation, Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corporation, Lew Wasserman, and Sidney J. Sheinberg.

All claims against MCA Inc., Lew Wasserman, and Sidney J. Sheinberg have been dismissed and those defendants are no longer parties to the action. Matsushita Acquisition Corporation no longer exists by virtue of being merged into MCA Inc.

RULE 29.1 STATEMENT

Pursuant to Sup. Ct. R. 29.1, Petitioners Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corporation hereby state that their only parent or subsidiary that is not wholly-owned is Cineplex Odeon Corporation.

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IN THE

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MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

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v.

WALTER MINTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corporation ("Matsushita") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals, *see* Appendix ("App.") 1a-44a, is reported on Westlaw at 1995 WL 75487. The opinion has not yet been assigned pagination in the Federal Reporter. The findings of fact and conclusions of law of the district court (App. 45a-61a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 27, 1995 (App. 1a), and denied a timely petition for rehearing and rejected a suggestion for rehearing in banc on April 6, 1995

(App. 62a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

Section 1738 of Title 28 provides, with respect to the authenticated acts, records and judicial proceedings of any State, that:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

SEC Rule 14d-10, 17 C.F.R. § 240.14d-10, provides, in relevant part:

> No bidder shall make a tender offer unless: (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

The complete text of Rule 14d-10 is set forth at App. 105a-106a.

STATEMENT OF THE CASE

Petitioners respectfully suggest that this case presents three issues worthy of certiorari. First, the court of appeals denied Full Faith and Credit to a final judgment entered on a class action settlement in Delaware state court, asserting a "policy" requiring that exclusively federal claims be resolved by settlement only in a federal court. This decision disables parties in a state court class action from reaching a global settlement of all claims or exchanging general releases where an exclusively federal claim has been or arguably could be asserted. It thus retroactively calls into question the finality of all state court class action settlements releasing federal claims as to which the statute of limitations has not run. By compromising the finality of judgments entered in state courts, the court of appeals intrudes on the ability of state courts to fully resolve cases involving both federal and state

claims. This interference with the ability of state courts to resolve complex litigation is particularly striking in this case because Delaware is recognized as having a significant interest in the regulation of corporate affairs, a matter primarily of state concern.[1]

Second, the court of appeals implied a private right of action under SEC Rule 14d-10, concluding that when Congress enacted Section 14(d)(7) in 1968 it intended the federal courts to recognize an implied right of action under all of the rules promulgated thereunder, including Rule 14d-10, which the SEC did not adopt until 18 years later. This automatic implication of a private right of action contravenes bedrock principles of this Court and conflicts with the approach of the District of Columbia, Third and Sixth Circuit Courts of Appeal.

Finally, compounding these errors, the Ninth Circuit enlarged in an indeterminate way the scope of Rule 14d-10 by shifting the operative event that triggers regulation. The court of appeals extended the restriction that Rule 14d-10 imposes "during [a] tender offer" to any transaction regardless of when it occurs, if the transaction may be deemed to be "an integral part" of a tender offer. This holding, which directly conflicts with the law of the Fourth Circuit, replaces a clear and certain standard (the defined tender offer period) with a subjective one (the "integral part" test), thereby injecting massive uncertainties into the federal regulation of tender offers.

A. The Acquisition of MCA

Matsushita purchased MCA for $6.6 billion in 1990. The two-step acquisition involved a public tender offer for MCA shares and a privately negotiated purchase of the MCA shares owned by

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[1] The Delaware courts' expertise in matters of corporate law grows out of the fact that "Delaware is the state of incorporation of roughly half of the Fortune 500 companies." Frank H. Easterbrook & David R. Fischel, *The Economic Structure of Corporate Law* 212-13 (1991). *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1343 (7th Cir. 1990) (Delaware courts are the "Mother Court of corporate law"), *rev'd on other grounds*, 500 U.S. 90 (1991); *NCR Corp. v. American Tel. & Tel. Co.*, 761 F. Supp. 475, 499 (S.D. Ohio 1991); *see generally* William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351, 355 (1992).

MCA founder Lew Wasserman (the "Wasserman transaction"). The tender offer price of $66 per share was paid in cash and tendering shareholders received close to a 100% premium over the market price. The Wasserman transaction consisted of a tax-free exchange of Wasserman's MCA shares for an illiquid preferred stock designed by Matsushita and MCA to be no more valuable than the tender offer consideration. The Wasserman transaction, which was fully disclosed in the public tender offer materials, was intended to satisfy Mr. Wasserman's unique tax planning and estate needs arising in part from his age (77 in 1990) and his extremely low basis in the MCA stock ($.03 per share). *See Epstein Plaintiffs' Excerpts of Record* ("ER") 357, Ex.I at ¶¶ 1, 7.

Petitioner and Respondents stipulated during proceedings in the district court that the Wasserman transaction was entered into and consummated when no tender offer was pending. App. 49a-50a.

B. The State and Federal Actions

Class actions were filed on behalf of MCA shareholders in the Delaware Court of Chancery in September 1990 upon the publication of reports that Matsushita was seeking to acquire MCA. The class actions were consolidated and the Delaware court ordered expedited discovery.

In December 1990, the first federal class action was filed in the United States District Court for the Central District of California. That complaint, together with several subsequently-filed related actions, alleged that Matsushita's tender offer violated Rule 14d-10, which requires equal consideration for all stock purchases made "during [a] tender offer." In April 1991, the district court denied plaintiffs' motion for class certification.

In February 1992, the California district court granted summary judgment to Matsushita and dismissed the federal complaints. Respondents appealed this decision to the Ninth Circuit Court of Appeals.

While the appeal was pending, the parties in the Delaware actions negotiated a settlement of all claims arising out of Matsushita's acquisition of MCA. The settlement provided all shareholders the right to opt out of the settlement.[2]

The Delaware Chancery Court certified a class for settlement purposes and approved a form of notice to the class that described in detail the federal claims asserted in the California district court actions and the status of the appeals in the Ninth Circuit. *See* App. 77a-101a. The notice made clear that approval of the Delaware settlement would release all state and federal claims arising out of the MCA transaction—specifically including those claims asserted in the California district court actions—and advised class members that they could preserve their state and federal claims by opting out of the settlement. App. 93a-94a, 96a-97a. In response to the class notice, only 19 of the more than 10,000 former MCA shareholders chose to opt out.[3]

The Delaware Chancery Court approved the settlement and entered a judgment releasing all claims of the class members who chose not to opt out. In determining that the settlement was "fair and reasonable," the Chancery Court considered the value of all of the state and federal claims that would be released, acknowledged that particular care should be taken in reviewing a settlement that would bar claims pending elsewhere, noted the possibility of a reversal by the Ninth Circuit, and rejected an attack on the adequacy of the representation of the Delaware class. App. 63a, 67a-70a.

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[2] Earlier, while the federal actions were still pending in the California district court, an agreement was reached in the Delaware proceeding for a non-opt out class settlement that would have released all claims arising out of the MCA acquisition in exchange for non-monetary consideration. The Chancery Court rejected this proposed settlement. *See In re MCA Inc. Shareholders Litig.*, 598 A.2d 687 (Del. Ch. 1991). The Chancery Court concluded that since the federal securities claims were pending in the district court, they had "at least arguable merit" and it would be unfair to release them in a non-opt out settlement. *Id.* at 691-93, 695-96.

[3] The 19 opt-outs included Respondents Rockford, Minton, and six Minton family members and investment trusts. Respondents Epstein, Linder and the Karlins elected *not* to opt out. No named Respondent objected to the settlement in the Delaware Chancery court.

Thereafter, in September 1993, the Delaware Supreme Court affirmed the Chancery Court on the basis of the lower court's opinion. App. 76a.

C. The Opinions Below

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

The federal complaints allege that the tender offer violated SEC Rule 14d-10 on the theory that the preferred stock Wasserman received was allegedly more valuable than the $66 cash tender offer consideration. Since it was stipulated that the Wasserman transaction was entered into before the public tender offer commenced and consummated after the tender offer had expired (ER 354, § 5), the district court held that the Wasserman transaction was not regulated by Rule 14d-10 and granted summary judgment in favor of Matsushita dismissing the federal actions. App. 52a-60a.

During the pendency of the appeal of this decision to the Ninth Circuit, the Delaware Supreme Court affirmed the Delaware judgment approving the state court settlement. App. 76a. Matsushita invoked the Delaware final judgment in the Ninth Circuit as a bar to prosecution of the appeal by the parties who had participated in the Delaware settlement. Matsushita relied on the Full Faith and Credit Act, 28 U.S.C. § 1738, and the law of this Court enunciated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), regarding the binding effect of opt out class action settlements. The Ninth Circuit, however, refused to grant full faith and credit to the Delaware judgment, holding that a class settlement involving the release of exclusively federal claims cannot be approved in state court. The Ninth Circuit reversed the order granting summary judgment to Matsushita, entered summary judgment for plaintiffs holding that the Wasserman transaction violated Rule 14d-10, and directed certification of a class consisting principally of the thousands of MCA shareholders who had chosen *not* to opt out of the Delaware state court settlement and *who had already accepted the proceeds of the Delaware settlement.*

REASONS FOR GRANTING THE PETITION

1. *Full Faith and Credit.* For nearly three decades the federal courts have uniformly held that state and federal claims can be released in a state court settlement. *See, e.g., TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-84 (9th Cir. 1978); *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 762 (2d Cir. 1968). The court of appeals ignored this uniform case law and fashioned an unprecedented exception to the Full Faith and Credit Act in direct conflict with the law of the First and Third Circuits.[4] The court of appeals' decision seriously impairs the ability of state courts to settle complex litigation. As a practical matter, it forces class action litigants into a federal forum because it is now wholly improvident for a defendant to settle a state class action raising allegations that could also be the basis for an exclusively federal claim. *See, e.g., Raskin v. Birmingham Steel Corp.*, 1990 WL 193326 at *7 (Del. Ch. Dec. 4, 1990) ("[i]n many cases of this kind a fair settlement of a claim arising from the fairness of a merger will entail the release of federal securities law claims arising from the merger . . . . Settlement of stockholder class actions asserting breach of corporate directors fiduciary duties would hardly be practicable otherwise") (citations omitted). Thus, state class actions are radically discouraged. The court's decision also opens the door to manipulation by class members who, as in this case, can obtain the benefits of a settlement in state court and thereafter litigate in federal court.

The legal system depends upon the finality of judgments. In order to enter judgment upon the settlement, the Delaware Chancery Court was obligated to and did find that the class was adequately represented and that the settlement was fair and adequate. App. 73a-74a. Those findings were affirmed by the Delaware Supreme Court. This having been done, the legal effect of the settlement should have been determined once and for all;

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[4] *See Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1564 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *Sandler Assocs., L.P. v. BellSouth Corp.*, 818 F. Supp. 695 (D. Del. 1993), *aff'd*, 26 F.3d 123 (3d Cir.), *cert. denied*, 115 S. Ct. 481 (1994).

under the Full Faith and Credit Act, the court of appeals could not properly disregard the judgment entered upon the settlement. There is a recognized public policy favoring the finality of judgments entered on settlements because courts should facilitate (not undermine) freedom of contract. *See, e.g., Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 313 (7th Cir. 1980) ("there is an overriding public interest in favor of settlement .... Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources").

Where a judgment is entered on a settlement, full faith and credit has the important consequence of holding parties to their bargain. The court of appeals' decision, however, permits federal courts to override a state court judgment entered upon a settlement, and thus to disregard one purpose of the Full Faith and Credit Act by allowing parties to renege on their court-approved agreements. Indeed, the court of appeals' decision retroactively threatens the finality of an unknown number of fully consummated state class action settlements which involved the release of federal claims. *See Nottingham Partners v. Dana*, 564 A.2d 1089, 1104 (Del. 1989) ("the Court of Chancery has a history of approving settlements that have implicitly or explicitly included a general release, which would also release federal claims") (footnote omitted).

This Court has held in a series of cases from *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), to *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), that certain federal statutes which confer exclusive federal jurisdiction do not create an exception to Section 1738. And the First and Third Circuits have held that state court judgments releasing federal securities law claims are entitled to full faith and credit. When this Court denied certiorari in the *Grimes* and *Sandler* cases last year, there was no inter-circuit conflict on the preclusion issue presented here. Now there are four circuit court cases addressing the issue, and this case irreconcilably conflicts with the other three. This case squarely presents the unresolved issue of whether the Williams Act creates an exception to Section 1738 in the context of a state court judgment entered on a class action settlement releasing federal securities law claims.

2. *Private Right of Action.* The court of appeals is the first in the nation to hold that every regulation promulgated under a statute that has been held to be privately enforceable automatically confers its own private right of action—regardless of the language or purpose of that regulation. This conception is at odds with "settled interpretive principles regarding implied causes of action," *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1455 (1994), and conflicts with the law of other Circuits. The holding below, harking back to *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), authorizes the creation of new private rights that lack a basis in congressional intent. This case presents a timely opportunity to address the circumstances under which agency regulations may be enforceable by private suit.

3. *Tender Offer Regulation.* The Fourth Circuit has recognized that Rule 14d-10, which regulates the payment of certain consideration "during [a] tender offer," operates—just as a no parking sign operates—only during a defined period and not at other times. *See Kahn v. Virginia Retirement Sys.*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994). The parties here had stipulated that the Wasserman transaction was agreed to and consummated when no tender offer was pending. The court of appeals held, however, *as a matter of law*, that because the Wasserman transaction was "conditioned" on the successful completion of the public tender offer, it would be "deemed" to have taken place *during* the tender offer even though it did not in fact take place at that time. App. 17a-18a. The court of appeals superimposed on the statutorily-specified tender offer period an ill-defined extension of that period. The court held that since the Wasserman transaction "is deemed a part of the tender offer, the tender offer does not end, by definition, until [the Wasserman transaction] is performed [and] [p]erformance of [that transaction] ... will therefore take place 'during the tender offer ....'" App. 17a, n.19. Thus, the court of appeals sharply limited the ability of tender offerors to confidently structure transactions in accordance with clearly defined rules, thereby creating enormous uncertainty in the law.

I. THE COURT OF APPEALS HAS CREATED AN ANOMALOUS EXCEPTION TO THE FULL FAITH AND CREDIT ACT THAT WILL FRUSTRATE THE SETTLEMENT OF CLASS ACTION LITIGATION

The Delaware state court judgment was entered on a settlement expressly terminating the federal claims of MCA shareholders who participated in the settlement. *See* App. 102a-104a.[5]

A. As Recognized by the First and Third Circuits, a State Court Judgment Approving a Class Action Settlement Releasing State and Federal Claims is Entitled to Full Faith and Credit

A federal court determining the preclusive effect of a state court judgment must apply the preclusion law of the state in which the judgment was rendered. *Kremer*, 456 U.S. at 481-82; *see also Parsons Steel*, 474 U.S. at 525-26 (reversing and remanding for determination under state preclusion rules the effect of state court judgment on federal Bank Holding Company Act claim); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985) (reversing and remanding for determination under state preclusion rules the effect of state court judgment on exclusively federal antitrust claim). When a release is embodied in a Delaware state court judgment, making it a record and judicial proceeding under the Full Faith and Credit Act, the release becomes entitled to the same preclusive effect in a federal court that it would be given under Delaware law. The law of Delaware recognizes that a judgment entered on a settlement is entitled to full preclusive effect. *See In re Union Square Assocs. Secs. Litig.*, 1993 WL 220528 at *3 (Del. Ch. June 16, 1993); *Sternberg v. O'Neil*, 1989 WL 137932 at * 4 (Del. Ch. Nov. 9, 1989); *Schlaeppi v. Delaware Trust Co.*, 525

[5] The Delaware judgment stated that "[a]ll claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise), whether known or unknown . . . *including without limitation the claims asserted in the California Federal Actions* . . . are hereby compromised, settled, released and discharged with prejudice by virtue of the proceedings herein and this Order and Final Judgment." App. 74a-75a (emphasis added).

A.2d 562, 565 (Del. Ch.), *aff'd*, 523 A.2d 981 (Del. 1986), *cert. denied*, 484 US 826 (1987).[6]

The First and Third Circuits have expressly held that a federal court must grant full faith and credit to a Delaware state court judgment entered upon a class action settlement that releases federal securities claims. *Grimes*, 17 F.3d at 1557, 1563-64; *Nottingham*, 925 F.2d at 32-33. Contrary to the holdings in *Nottingham* and *Grimes*, the court of appeals held:

> We believe that a state court cannot require passive class members to contractually release their exclusively federal claims in order to enjoy the benefits of a state class action, when the court has no jurisdictional power to dispose of those claims either directly or indirectly through the doctrine of issue preclusion.

App. 40a. This conclusion is directly at odds with *Nottingham*, 925 F.2d at 34, which involved a Delaware state court class action settlement, and in which the First Circuit held:

> [A]s a matter of federal law, a state court can approve and enforce a settlement which requires a party to release claims actually brought, or potentially "bringable," in federal court under "exclusive jurisdiction" federal statutes even though the state court could not adjudicate claims arising under such statutes.

In *Grimes*, which also involved a Delaware state court class action settlement, the Third Circuit held that it too:

> recognize[s] the broad power of state courts to approve and enforce settlements which reflect the parties' intent to release all claims arising from a transaction regardless of whether the class action court has jurisdictional competency to hear those claims.

[6] Delaware law also provides that "[w]hen a state court settlement of a class action releases all claims which arise out of the challenged transaction and is determined to be fair and to have met all due process requirements, the class members are bound by the release or the doctrine of issue preclusion. Class members cannot subsequently relitigate the claims barred by the settlement in a federal court." *In re MCA, Inc. Shareholders Litig.*, 598 A.2d at 691 (citations omitted); *Union Square*, 1993 WL 220528 at *3-4 (res judicata bars any claim that "arises (at least partially) out of the same transaction," including "similar, though not identical claims").

17 F.3d at 1564 (citations omitted); *see also Sandler*, 818 F. Supp. at 704 (recognizing Delaware Chancery Court's "power to approve a release encompassing federal securities law claims . . . not within the subject matter jurisdiction of the Delaware State courts").[7] Significantly, *Grimes*, *Nottingham*, and *Sandler* involved *non*-opt out settlements. *See Grimes*, 17 F.3d at 1555; *Nottingham*, 925 F.2d at 33; *Sandler*, 818 F. Supp. at 700. *A fortiori*, the rights of class members who are afforded an opportunity to opt out are fully protected.

B. The Court of Appeals Improperly Held That Federal "Policy" Restricts the Operation of the Full Faith and Credit Act

The court of appeals engrafted onto the Full Faith and Credit Act an exception based on a supposed "public policy" concern for

[7] In addition to *Grimes*, *Nottingham*, and *Sandler*, other courts have recognized that individual, derivative and class settlements in state court can resolve exclusively federal claims. *See, e.g., TBK*, 675 F.2d at 460 ("we have recognized the authority of a state court to approve a settlement that releases a claim within the exclusive jurisdiction of the federal courts"); *Green*, 577 F.2d at 1383-84 (state settlement involving state fiduciary claims bars subsequent assertion of Exchange Act claims based on same facts); *Abramson*, 392 F.2d at 762 ("[a]lthough the state court could not adjudicate the federal claim, it was within its powers over the corporation and the parties to approve the release of that claim as a condition of settlement of the state action"); *Gabelli v. Sikes Corp.*, 1990 WL 213119 at *5 (S.D.N.Y. Dec. 14, 1990) (staying federal securities action pending court approval of Florida state court class settlement "because of the imminent possibility that the Florida courts will dispose of the exclusive federal issue by approving the settlement and its attendant releases"); *Lowenschuss v. Resorts Int'l, Inc.*, 1989 U.S. Dist. LEXIS 7407 at *20 & n.15 (E.D. Pa. June 29, 1989) (state court class action settlement bars exclusively federal claims), *aff'd without op.*, 947 F.2d 936 (3d Cir. 1991); *Seagoing Uniform Corp. v. Texaco, Inc.*, 705 F. Supp. 918, 923 (S.D.N.Y. 1989) (recognizing state court's authority in "class action derivative" suit to approve settlement releasing exclusively federal claims); *Bernstein v. Mediobanca Banca di Credito Finanziario-Societa per Azioni*, 78 F.R.D. 1, 2, 5 (S.D.N.Y. 1978) (general release in state court settlement bars federal securities action); *Nottingham Partners v. Dana*, 564 A.2d at 1104-05 (law "uniformly" distinguishes between state's power to approve a general release of an exclusively federal claim and its lack of power to adjudicate the same); *cf. In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (*5th Cir.* 1981) ("even when the court does not have power to adjudicate a claim, it may still approve release of that claim as a condition of settlement of [an] action [before it]") (citation omitted).

the rights of class members. App. 39a-40a & n.33. The "policy" that motivated the Ninth Circuit is that although:

- a state court judgment can determine factual issues that are preclusive with regard to later federal causes of action,[8]
- non-federal forums sometimes adjudicate causes of action within the exclusive jurisdiction of the federal courts,[9] and
- a state court-approved release terminates exclusively federal causes of action in individual and derivative actions,
- *nonetheless*, the Delaware judgment here is not to be given preclusive effect because, supposedly, only a federal court can approve a class action settlement that releases a federal securities claim.

Thus, the court of appeals held that the enactment of the Williams Act created an exception to the Full Faith and Credit Act. *See* App. 28a, n.25.[10]

[8] *See Becher v. Contour Labs., Inc.*, 279 U.S. 388, 390-92 (1929) (Holmes, J.); *Murphy v. Gallagher*, 761 F.2d 878, 886 (2d Cir. 1985).

[9] Exclusively federal claims may be decided outside of the federal courts, including (1) in arbitration, *see, e.g., Shearson v. MacMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (federal antitrust claims); (2) when exclusively federal claims are raised in state court by way of affirmative defense, *see, e.g., Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 821-22 & n.22 (9th Cir. 1975); and (3) under principles of forum non conveniens, where a foreign sovereign has the ability to adjudicate "somewhat similar" claims, *see, e.g., Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991) (securities claims decided in Canada), *cert. denied*, 502 U.S. 1095 (1992). Such judgments are entitled to the same preclusive effect as a judgment entered upon a jury verdict for purposes of Section 1738. *See, e.g., Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 385 (2d Cir. 1989).

[10] The court below reasoned, citing Judge Friendly's dicta in *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981), that a state court lacked the power to approve the settlement of claims over which it could not assert jurisdiction for purposes of adjudication. App. 28a-34a. This assertion is plainly wrong. Approving a settlement including the release of federal claims is not an exercise of subject matter jurisdiction over those claims. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1288 (9th Cir.) ("it was not necessary . . . to actually exercise subject matter jurisdiction over the claims to approve their release"), *cert. denied*, 113 S. Ct. 408 (1992); *Abramson*, 392 F.2d at 762 (in personam jurisdiction provides state court with authority to approve release of federal claims regardless of

This Court has consistently rejected arguments that federal statutes limit the scope of Section 1738. In *Migra v. Warren County Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984), which addressed the interplay between Section 1738 and 42 U.S.C. § 1983, this Court stated that Section 1738 "embodies the view that it is more important to give full faith and credit to state court judgments than to ensure separate forums for federal and state claims." *See also Allen v. McCurry*, 449 U.S. 90, 97-98 (1980) (no basis to find that the creation of a federal cause of action under Section 1983 impliedly repeals the Full Faith and Credit Act). And, in analyzing the relationship between Section 1738 and the Anti-Injunction Act, 28 U.S.C. § 2283, this Court reversed a judgment of the Eleventh Circuit, which "gave unwarrantedly short shrift to the important values of federalism and comity imbeded in the Full Faith and Credit Act." *Parsons Steel*, 474 U.S. at 522-23; *see also Kremer*, 456 U.S. at 463, 476 (Title VII does not "supersede the principles of comity and repose embodied in § 1738"); *Marrese*, 470 U.S. at 385-86 (the concerns underlying Section 1738 "certainly are not made less compelling because state courts lack jurisdiction over federal antitrust claims").

"[A]n exception to Section 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 466 (absent "manifest incompatiblity" on the face of the statute no implied repeal will be found); *see also Marrese*, 470 U.S. at 380. Thus, the inquiry is not, as the Ninth Circuit had it, whether Congress intended Section 1738 to apply to a state judgment depending on the type of claims at issue. App. 34a. Section 1738 applies to *all* state judgments. *Marrese*,

subject matter jurisdiction); *Grimes*, 17 F.3d at 1563-64 ("the Delaware court did not exercise any inherent power to release causes of action that it had no jurisdiction to entertain. Rather the Delaware court only acted to enter a settlement agreement that was initiated, negotiated, and adopted by the parties to a lawsuit that was properly before it"). Entry of judgment upon a class settlement containing a broad release of exclusively federal claims "does not in any way interfere with or limit the jurisdiction of the . . . federal court." *Nottingham Partners v. Dana*, 564 A.2d at 1105. That the settlement of federal claims by a state court is not a question of jurisdictional power is evident in the acknowledgment by the court of appeals of the finality of state court settlements of 1934 Act claims in individual and shareholder derivative suits. App. 37a-38a & n.32.

470 U.S. at 380; *Kremer*, 456 U.S. at 466-68. The proper issue is whether Congress in enacting the Williams Act expressly or impliedly created an exception to Section 1738. The Williams Act creates no such exception. *See, e.g., Murphy*, 761 F.2d at 884-85 (concluding that state court judgment precluded later federal securities law action and holding that Exchange Act neither expressly nor impliedly repealed Section 1738).[11]

The court of appeals' decision plays havoc with state court judgments and settlements generally.[12] The court of appeals failed to explain why unique safeguards should be created for members of classes certified in state courts who may be able to assert federal claims. Here the class members in the Delaware action were given the due process of notice, an opportunity to object, and the right to opt out. Although the court of appeals

[11] The court of appeals analyzed the preclusive effect of the Delaware judgment by misapplying the concept of issue preclusion. *See* App. 28a-37a. Issue preclusion is not a limitation on the scope of a release. Issue preclusion bars relitigation of an issue actually litigated in the prior proceeding. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The court of appeals adapted an issue preclusion test from *TBK*, even though the court acknowledged that case was not controlling here. *TBK* involved a federal court's approval of a settlement that extinguished state claims. *TBK* did not implicate the Full Faith and Credit Act and did not apply Delaware law. Even so, the court below misread *TBK*, which in fact held that "where there is a realistic identity of issues between the settled class action and the subsequent suit . . . . the paramount policy of encouraging settlements takes precedence." *TBK*, 675 F.2d at 461. The court of appeals' attempt to use the concept of issue preclusion is badly confused. The Full Faith and Credit Act requires federal and state courts to apply Delaware preclusion principles to the Delaware *judgment*, which embodies the terms of the class settlement. A court may limit the preclusive effect to the claims alleged in a complaint only when the representative class members did not have authority to compromise other claims arising from the transaction embodied in the suit. *See, e.g., Super Spuds*, 660 F.2d at 17. There was no such limitation of authority here.

[12] The court of appeals' decision will have an impact on a wide variety of cases in which facts underlying state law claims also may form the basis of exclusively federal claims. These include admiralty, 28 U.S.C. § 1333 (1988); antitrust, 15 U.S.C. § 15 (1988); commodity exchanges, 7 U.S.C. § 25(c) (1988); C.E.R.C.L.A., 42 U.S.C. § 9613(b) (1988); patent and copyright, 28 U.S.C. § 1338 (1988); and securities, 15 U.S.C. § 78aa (1988).

belittled the right to opt out as impractical and therefore inconsequential, *see* App. 39a-40a, this Court observed in *Shutts* that "the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." 472 U.S. at 813. Indeed, as the Third Circuit observed in *Grimes*, the fact that judicial review attends a judgment entered upon a class action settlement enhances the force and effect of the release upon non-representative class members because its fairness has been evaluated by a court:

> As a judgment, the settlement and release of claims is a contract that not only is agreed upon by the parties, but also is stamped with the imprimatur of the court with jurisdiction over the parties and the subject matter of the lawsuit.

17 F.3d at 1557.

In the analogous situation of the recognition by one state court of a judgment of another state court regarding a matter purportedly outside its jurisdictional competence, this Court has been very clear. When a class member has notice that court approval of a proposed settlement will release claims that could not be adjudicated in the releasing court and the class member fails to object to the release, the class member cannot raise that objection in another court. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Assoc.*, 455 U.S. 691, 710 (1982). Finding that preclusive effect must be given to the release, this Court held that the class member was "obliged to advance its argument that the [settling] Court did not have the authority to settle [those claims] when it was given the opportunity to do so [in that court]." *Id.* This Court made clear that "the rule of jurisdictional finality established in *Durfee v. Duke*" applied even though another court might have "exclusive jurisdiction over the subject matter of this litigation." *Id.* at 705 n.11.

Finally, the court of appeals ignored the substantial public policy issues inherent in affording full faith and credit to state court class action judgments recognized by the First and Third Circuit Courts in *Nottingham* and *Grimes*: advancing state-

federal comity, honoring parties' legitimate expectations, avoiding piecemeal litigation, encouraging settlements, and preventing forum shopping. As stated in *Sandler*:

> [T]he state court-approved release forecloses this federal action based on principles of comity between state and federal courts. *To deny effect to a release of claims merely because it was given in an action commenced in state court would invite unprecedented consequences.* Such a doctrine would unjustifiably proliferate litigation, defeat legitimate expectations of the settling parties, engender uncertainty among class members and defendants as to their ability to retain the benefits of settlements, discourage settlements altogether and create unwarranted conflict between state and federal courts.

818 F. Supp. at 705 (emphasis added).[13]

II. IMPLYING A PRIVATE RIGHT OF ACTION UNDER RULE 14d-10 VIOLATES PRINCIPLES ANNOUNCED BY THIS COURT AND CONFLICTS WITH DECISIONS OF THE DISTRICT OF COLUMBIA, THIRD AND SIXTH CIRCUIT COURTS OF APPEAL

This Court has limited the judicial implication of private rights of action to situations where Congress has indicated that there should be such a right. *See, e.g., Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 94 n.31 (1981) ("[i]n a case in which neither the statute nor the legislative history reveals a congressional intent to create a private right of action ... we need not carry the *Cort v. Ash* inquiry further"); *Thompson v. Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring) ("[t]he recent history of our holdings is one of repeated rejection of claims of an implied right").[14]

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[13] *See Nottingham*, 925 F.2d at 33 (if Respondents were "dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by certiorari, not to the lower courts in vain pursuit of back door relief").

[14] *See also Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 420 (D.C. Cir. 1992) (Ginsburg, J.) ("[o]ver the years since *Borak* ... the Court has exercised greater restraint in the implication of private rights of action"); *Smith v. Dearborn Fin. Servs., Inc.*, 982 F.2d 976, 980 (6th Cir. 1993) (same); *Spicer v. Chicago Bd. of Options Exch., Inc.*, 977 F.2d 255, 258 (7th Cir. 1992) (same); *Health Care Plan, Inc. v. Aetna Life Ins. Co.*, 966 F.2d 738, 740 (2d Cir. 1992) (same).

The court of appeals dismissed the notion that this Court's implied right of action jurisprudence has shifted in recent years toward a more restrictive approach:

> Matsushita's argument that there has been a recent sea change in the Court's implied right of action jurisprudence is based on wishful thinking, not case law. The argument is essentially the same one advanced by Justice Scalia in his concurring opinion in *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in the judgment), where he urged his colleagues to "get out of the business of implied private rights of action altogether." *Id.* at 192. The problem is that no other justice of the Court has yet to endorse the "get out of the business" approach to implied causes of action.

App. 9a-10a (footnote omitted).

The position advanced by Matsushita, but mischaracterized and summarily rejected by the court of appeals, merely reflects adherence to this Court's repeated teaching that "recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) (citation omitted). Two corollaries of this doctrine are equally important here: first, "the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended," *id.*; second, even if a statutory provision is found to be privately enforceable, agency rules promulgated thereunder do not automatically provide for a private right of action. Instead, a private party asserting an implied right of action must overcome the " 'hurdle facing any litigant' seeking to extend an implied right to a class with claims not comparable to those previously recognized." *Roosevelt*, 958 F.2d at 420-21 (quoting *Virginia Bankshares*, 501 U.S. at 1104). The court of appeals failed to examine the language, structure or purpose of Rule 14d-10, and ignored the fact that the Rule goes well beyond the scope of Section 14(d)(7).[15]

[15] Improperly consulting the contemporary legal context "[i]n 1968 when the Williams Act was enacted," the court of appeals reasoned that because "various lower federal courts had construed *Section 10(b)* of the 1934 Act as providing a private cause of action," it should be inferred that Congress intended that *Section 14(d)(7)* also so provides, and thus, automatically Rule 14d-10 as well. App. 6a (emphasis added). But Section 10(b) is irrelevant here; Rule 14d-10 was not promulgated pursuant to Section 10(b). *See*

The court of appeals' holding concerning a private right of action is inconsistent with *Roosevelt, supra, Ashbrook v. Block*, 917 F.2d 918 (6th Cir. 1990), and *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). These cases all employ a *two*-step inquiry to determine whether there is an implied right under an agency rule: (1) did Congress intend the enabling statute to create a private remedy that could be delegated to agency rulemaking, *and* (2) is the rule drafted such that a private right may be legitimately implied. *Roosevelt*, 958 F.2d at 421-25; *Ashbrook*, 917 F.2d at 926; *Angelastro*, 764 F.2d at 947-48.[16] The court of appeals ignored the second step of the analysis and stated the implication test as follows: "an agency rule contains a private right of action if Congress intended the statute under which it was promulgated to be privately enforceable." App. 5a n.8. This is a new implied right of action test of unprecedented breadth. The inevitable consequence of the court of appeals' reasoning is that Congress intended an implied right of action under each of the *ten* Rules promulgated under Section 14(d)(7) of the Williams Act. As this Court suggested in another context:

> If we were to rely on this reasoning now, we would be obliged to hold that a private right of action exists for every provision of the 1934 Act .... *There would be no logical*

Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 948 n.14 (3d Cir.) ("Congress' intent to permit private rights of action [under an SEC regulation] must stem from . . . the provision which granted the Commission the power to adopt the Rule"), *cert. denied*, 474 U.S. 935 (1985). Moreover, this Court has sanctioned consultation of historical implication standards only in two narrowly-defined circumstances, neither of which is raised by Rule 14d-10. *See Thompson*, 484 U.S. at 189-90 (Scalia, J., concurring); *see also Health Care Plan*, 966 F.2d at 742 ("we are told to determine whether a private cause of action is implied by applying the law in effect at the time of decision—[presently] a structured inquiry into Congress' intent—rather than the method of analysis that courts applied at the time of a statute's enactment").

[16] Federal district courts uniformly recognize the need to analyze SEC rules under a two-step analysis, in which the second step has had dispositive significance. *See, e.g., Arst v. Stifel Nicolaus & Co. Inc.*, 871 F. Supp. 1370, 1376-77 (D. Kan. 1994) (no private right under SEC Rule 10b-10 even though Section 10(b) provides such a right); *Siedman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 465 F. Supp. 1233, 1237 (S.D.N.Y. 1979) (no private right under SEC Rule 15c3-3(b) even though Section 15(c) of the Exchange Act was then interpreted to afford such a right).

> *stopping point to this line of reasoning* .... This approach, with its far-reaching consequences, would work a significant shift in settled interpretive principles regarding implied causes of action.

Central Bank, 114 S. Ct. at 1455 (emphasis added); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) ("we decline to read [*Borak*] so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action").

Rule 14d-10 states only that "[n]o bidder shall make a tender offer" unless the provisions of the Rule are followed. This language does not create a substantive right in the security holder; rather, it places a negative restriction on the bidder, which does not signify intent to confer a private right of action. *See Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 929 (10th Cir. 1994) ("a mere proscription of behavior does not justify an inference of a private cause of action for its violation; instead, there must be some evidence that Congress intended one") (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979)); *Health Care Plan*, 966 F.2d at 741 ("obligations, in and of themselves, do not provide a basis for conferring a private right of action on [beneficiaries of statute], without further indication of congressional intent"). Nor is there any mention of a private right of action in the numerous SEC releases promulgating and explaining Rule 14d-10.[17]

Courts should be particularly reluctant to imply a private right of action where, as here, the language of the Rule goes beyond the requirements of the statute. Congress enacted Section 14(d)(7) to ensure that shareholders who tendered their shares early in the course of a tender offer would receive the benefit of a subsequent increase in the tender offer price *during the tender offer*. *See Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 874 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974). As interpreted by the court of appeals, for purposes of establishing a violation, Rule 14d-10(c)(1) "obviates the need for plaintiffs" to prove that any shareholder received "higher consideration" during a tender offer when more than one type of consideration is offered. App. 13a, n.17. Thus, as interpreted by the court of appeals, a violation of Rule 14d-10 can be established without

[17] *See, e.g.*, SEC Release No. 34-22198, 1985 SEC LEXIS 1175 (July 1, 1985); SEC Release No. 34-23421, 1986 SEC LEXIS 1179 (July 11, 1986).

proof that higher consideration was paid to certain shareholders, and without regard to timing, both of which are integral to Section 14(d)(7).

Finally, unlike any provision of Section 14(d)(7), Rule 14d-10(e) allows the SEC to exempt transactions from the Rule's application. Such a provision is inconsistent with a private right of action because it would allow the SEC to suspend such a right by discretion. *See Touche Ross*, 442 U.S. at 574; *cf. Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478 (1977) ("we are reluctant to recognize a [private] cause of action here to serve what is 'at best a subsidiary purpose' of the federal legislation").[18]

III. THE COURT OF APPEALS EXPANDED RULE 14d-10 IN CONFLICT WITH THE LAW IN THE FOURTH CIRCUIT AND THE TENDER OFFER REGULATORY SCHEME CREATED BY CONGRESS

Section 14(d)(7) requires a bidder that raises its offer "before the expiration" of a tender offer to pay the higher consideration to shareholders who tendered shares prior to the announcement of the higher offer. In accordance with this statutory enabling provision, Rule 14d-10 is operative only "during [a] tender offer." The entire statutory and regulatory scheme in this area revolves around a clearly-defined tender offer period because certainty in the planning of transactions is of critical importance.

This Court has recognized that parties attempting to structure complex corporate transactions to comply with the federal securities laws must be afforded certainty and predictability. *See Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985) (rejecting efforts to "inject uncertainty into the tender offer process"); *see also Pinter v. Dahl*, 486 U.S. 622, 652-53 (1988) (securities industry "demands certainty and predictability"). The regulation of tender offers is an issue of national importance.

[18] The SEC reviewed Matsushita's acquisition of MCA and had the authority to bring an injunction action if appropriate. The possibility that an implied right of action might "enhance the administrative remedies provided" under the Williams Act is not a justification for implying a private right of action. *Harper v. Federal Land Bank*, 878 F.2d 1172, 1176-77 (9th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990); *see also Central Bank*, 114 S. Ct. at 1448. In situations in which Congress explicitly relied upon an administrative scheme to induce compliance, courts "should be particularly reluctant to imply a private cause of action without sufficient evidence of Congress' intent." *Health Care Plan*, 966 F.2d at 741 (citing *Touche Ross*, 442 U.S. at 574).

Through tender offers, corporations redistribute assets, unlock the value of moribund publicly-held stock, and increase global competitiveness. The value of the 80 tender offers launched in the United States last year exceeded $53 billion. By their nature, tender offers customarily cut across national and international boundaries.

Rejecting concerns about certainty and planning, the court of appeals held that if a private purchase such as the Wasserman transaction is conditioned on a tender offer, it should be deemed an integral part of the tender offer. App. 18a. Thus, the court of appeals reasoned, the tender offer does not end until the private purchase is consummated and therefore, such a private purchase takes place "during the tender offer" and falls within the scope of Rule 14d-10. App. 17a, n.19.[19]

But why should the mere "conditioning" of a stock purchase agreement on the consummation of a tender offer convert a separate transaction—done during one time period—into an "integral part" of a tender offer in a different time period? The parties have stipulated that the Wasserman transaction was agreed to and consummated when no tender offer was pending.[20]

The court of appeals' interpretation of Rule 14d-10 creates a direct conflict with the law of the Fourth Circuit. *Kahn, supra*, involved a series of overlapping and interrelated transactions that straddled a public tender offer. The district court in *Kahn* held that "*because no purchases occurred during the pendency of the tender offer*," the Rule 14d-10 claim must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). 783 F. Supp. at 272. The Fourth

[19] The court of appeals' expansion of Rule 14d-10 will inevitably give rise to challenges to executive compensation arrangements that are typically made by a tender offeror with incumbent management. Thus, employment arrangements entered into for the purpose of securing continuity of management may be challenged as disguised payments for tendered shares regardless of when the payments are made. Indeed, the court of appeals remanded for trial a Rule 14d-10 claim involving an employment-related payment to MCA's President, Sidney Sheinberg. App. 23a.

[20] Specifically, in the pre-trial order in the district court litigation, the parties stipulated that (1) the Wasserman transaction was entered into on November 26, 1990, (2) on November 30, Matsushita filed a Schedule 14D-1 [*the event commencing the tender offer period, see* Rule 14d-2], (3) at 12:05 a.m. on December 29, Matsushita gave notice of acceptance of the tendered shares [*the event terminating the tender offer*], and (4) the Wasserman transaction was consummated thereafter. *See* ER 354 § 5, ¶¶ 16, 17, 19, 21.

Circuit affirmed. *See Kahn*, 13 F.3d at 111-13 (recounting district court's analysis). Thus, once it was determined that the private stock transactions did not take place "during the tender offer period," no further analysis was necessary.

The court of appeals sought to distinguish *Kahn* solely on the ground that the private stock purchase in *Kahn* was "unconditional." App. 19a. Nothing in either *Kahn* decision suggests that this is so. Moreover, official disclosure documents filed by the *Kahn* parties with the SEC make clear that the private purchases were expressly conditioned on the success of the public tender offer. *See* App. 108a. In short, this case is not distinguishable from *Kahn* in any meaningful way, and a transaction which is sanctioned in the Fourth Circuit is now illegal in the Ninth Circuit. Tender offerors should not be subject to such "conflicting regulatory requirements." *Kahn*, 783 F. Supp. at 270.

The court of appeals' construction of Rule 14d-10 ignores this Court's mandate that a court may not expand the reach of a rule beyond its express language. *See Central Bank*, 114 S. Ct. at 1447 ("the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit") (citation omitted). By its terms, Rule 14d-10 is limited in its reach. The Rule prohibits certain payments "during such tender offer." Rule 14d-10 plainly does not presume to regulate payments that are "conditioned" on the success of a tender offer, or are "an integral part of" a tender offer. "During" means "[t]hroughout the course or duration of" or "[w]ithin the time of." Webster's II, New Riverside Dictionary (1984). The term connotes a finite temporal interval which the Ninth Circuit read out of the Rule by expanding its proscriptions to reach transactions not within the temporal confines of the Rule.

The SEC extensively considered *and rejected*—both before and after the adoption of Rule 14d-10—tender offer rules governing post-tender offer stock purchases.[21] Rejection of these

[21] *See, e.g.*, SEC Release No. 34-15548, 1979 SEC LEXIS 2204 at *19 (Feb. 5, 1979) (proposing Rule 14d-8 which sponsored 40 day post-offer integration period); SEC Release No. 34-16384, 1979 SEC LEXIS 217 at *3 (Nov. 29, 1979) (withdrawing proposed Rule 14d-8); SEC Release No. 34-16385, 1979 SEC LEXIS 218 at *34-50 (Nov. 29, 1979) (proposing Rule 14e-4 which is first proposal to codify "all-holders" and "best-price" principles later adopted as Rule 14d-10; and simultaneously proposing separate Rule 14e-5 prohibiting purchases by bidder for 10 days following termination of tender offer, which rule is never adopted); SEC Release No. 34-24976, 1987

proposals by the SEC negates the court of appeals' proposition that they are nevertheless now embraced in Rule 14d-10. *See Fogel v. Chestnutt*, 533 F.2d 731, 752-53 n.25 (2d Cir. 1975), *cert. denied*, 429 U.S. 824 (1976); *see also TransCanada Pipelines Ltd. v. Federal Regulatory Comm'n*, 878 F.2d 401, 411 (D.C. Cir. 1989) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). [22]

Both Section 14(d)(7), the enabling statute for Rule 14d-10, and Rule 10b-13, which regulates side purchases during a tender offer, cease operation when the tender offer expires. *See Kramer v. Time Warner, Inc.*, 1990-91 Fed. Sec. L. Rep. (CCH) ¶ 95,619, at 97,902 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 767 (2d Cir. 1991).[23] The SEC has stated that the tender offer rules are designed so that "security holders will have only one date to be concerned with—the expiration date." SEC Release No. 34-23421, 1986 SEC LEXIS 1179 at *46 (July 11, 1986); *cf. Gustafson v. Alloyd Co., Inc.*, 115 S. Ct. 1061, 1069 (1995). Eliminating the temporal limitation on Rule 14d-10, as the court of appeals did here, will confound tender offerors and shareholders alike and undermine the predictability of the entire regulatory scheme.

SEC LEXIS 3545 at *28-33 (Oct. 1, 1987) (proposing 10 day post tender offer integration period that has never been adopted).

[22] A defined time period also is consistent with the two purposes of Rule 14d-10: (1) to ensure that the "highest price paid to any tendering security holder . . . be paid to any other tendering security holder," and (2) to prevent discriminatory tender offers made to fewer than all holders, which pressure the excluded group to sell to the favored group (at a reduced price) before the expiration of the offer. *See* SEC Release No. 34-23421, 1986 SEC LEXIS 1179 at *10, *27 (July 11, 1986). Thus, Rule 14d-10 should be interpreted as written and intended by the SEC and not as a general "antidiscrimination" provision which reaches into matters properly within the purview of state law. App. 12a. The federal securities laws "create an extensive scheme of civil liability," and each regulation plays a distinct role. *Central Bank*, 114 S. Ct. at 1445, 1451.

[23] Other federal tender offer regulations are triggered by the end of the tender offer period. For example, SEC Rule 14e-1(c) requires payment of the tender consideration "promptly after the termination" of the offer. If the tender offer rules do not operate within a clearly defined time frame, the operative event for such Rules will be in doubt.

CONCLUSION

The decision of the court of appeals is at odds with the law of this Court on each of the issues as to which Matsushita seeks certiorari. The decision also directly conflicts with the law of the District of Columbia, First, Second, Third, Fourth, and Sixth Circuit Courts. In addition to the dramatic adverse impact of this decision on state and federal litigation in this country, the decision exposes Matsushita to a multi-billion dollar liability. The petition for a writ of certiorari should be granted.

May 3, 1995

Respectfully submitted,

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. AND MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

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MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. AND MATSUSHITA HOLDING CORPORATION,

PETITIONERS,

v.

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE EPSTEIN; JOHN LINDER; JANE ROCKFORD, as trustee of the Michael J. Rockford Trust; MAURICE KARLIN; RUTH KARLIN; BETH ANN KARLIN; BERT P. KARLIN,

Plaintiffs-Appellants,

v.

MCA, INC.; MATSUSHITA ACQUISITION CORPORATION; MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD; MATSUSHITA HOLDING CORPORATION; LEW WASSERMAN; SIDNEY J. SHEINBERG,

Defendants-Appellees.

No. 92-55675
D.C. No.
CV 90-6451-R

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted

August 2, 1993—Pasadena, California
Submission Vacated August 13, 1993
Reargued and Resubmitted October 12, 1993

Filed February 27, 1995

Before: William A. Norris, Charles Wiggins,
and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Norris

In 1990, Matsushita Electrical Co. Ltd. ("Matsushita") acquired MCA, Inc. ("MCA") for $6.1 billion. The acquisition was accomplished through a tender offer of $71 per share of MCA common stock.[1]

Lew Wasserman, MCA's chairman and chief executive officer at the time, owned 4,953,927 shares of MCA common stock worth $351,728,817 at the tender price of $71 per share. His cost basis was 3¢ per share. Rather than tender his shares at the tender offer price, Wasserman entered into a separate agreement with Matsushita, known as the "Capital Contribution and Loan Agreement," pursuant to which Wasserman exchanged his shares for preferred stock in a wholly-owned Matsushita subsidiary called "MEA Holdings." [2] Matsushita agreed to fund MEA Holdings by contributing 106% of the tender price multiplied by the number of MCA shares Wasserman exchanged. The MEA Holdings preferred stock Wasserman received pays a dividend of 8.75% annually, is secured by letters of credit, and is redeemable upon the death of either Wasserman or his wife, but in no event earlier than five years from the date of the exchange. Wasserman was 77 at the time. It is not disputed that the transaction was designed to be a tax-free exchange of Wasserman's MCA stock under Internal Revenue Code § 351(a), 26 U.S.C. § 351(a) (1994). [3]

Sidney Sheinberg, MCA's chief operating officer at the time of Matsushita's tender offer, owned approximately 1,179,635 shares of MCA common stock. He tendered these shares pursuant to Matsushita's $71 per share offer and received in exchange consideration worth approximately $83,754,085. Two days after Matsushita accepted all tendered shares, Sheinberg received an

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[1] Tendering shareholders received $66 in cash and $5 worth of stock in WWOR-TV, a television station that was spun-off from MCA because of legal restrictions on foreign ownership of domestic broadcast stations.

[2] Wasserman also received for each of his shares the $5 worth of stock in WWOR-TV that all tendering shareholders received.

[3] Upon the death of Wasserman or his wife, the basis of all their community property, including the Matsushita preferred stock, would "step up" to its fair market value. *See* Internal Revenue Code §§ 1014, 2032.

additional $21 million in cash, ostensibly in exchange for unexercised MCA stock options.

These consolidated appeals arise out of actions brought in the United States District Court for the Central District of California by former MCA shareholders[4] who tendered their shares for the $71 tender price. They claim that Matsushita violated SEC Rule 14d-10, 17 C.F.R. § 240.14d-10 (1994), by treating Wasserman and Sheinberg differently from other shareholders in the tender offer. Rule 14d-10, known as the "all-holder, best-price" rule, requires bidders to treat all shareholders on equal terms. [5]

The district court denied plaintiffs' motion for summary judgment on their claim that Matsushita's agreement to pay Wasserman consideration that was different from the $71 per share tender offer violated Rule 14d-10, and later granted Matsushita's motion for summary judgment on this claim.[6] We reverse, instruct the district court to grant plaintiffs' motion for partial summary judgment, and remand for further proceedings to determine the amount of damages, if any, that plaintiffs are entitled to recover as a result of the Wasserman transaction.

The district court granted Matsushita's motion for summary judgment on all of plaintiffs' claims. As noted above, with respect to plaintiffs' claim that the Wasserman transaction violated Rule

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[4] The consolidated appeals involve two sets of plaintiffs, each of whom filed separate complaints. Walter Minton ("Minton") brought this action in his individual capacity. Lawrence Epstein, John Linder, Jane Rockford, Maurice Karlin, Ruth Karlin, Beth Karlin, and Bert Karlin ("Epstein plaintiffs") brought suit both individually and on behalf of all MCA shareholders at the time of the tender offer.

[5] Plaintiffs also claim that the Wasserman and Sheinberg transactions violated SEC Rule 10b-13, 17 C.F.R. § 240.10b-13 (1994). The district court dismissed this claim, pursuant to Fed. R. Civ. P. 12(b)(6), for want of a private right of action. On the facts of this case, any relief plaintiffs could obtain under Rule 10b-13 is also available under Rule 14d-10. *See Field v. Trump*, 850 F.2d 938, 946 n.3 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). We therefore do not consider plaintiffs' Rule 10b-13 claim.

[6] Plaintiffs did not seek summary judgment on their claim that the $21 million payment to Sheinberg also violated Rule 14d-10.

14d-10, we reverse. With respect to plaintiffs' claim that the Sheinberg payment violated Rule 14d-10, we vacate and remand for further proceedings to determine whether the $21 million Sheinberg payment was in fact a premium paid to encourage Sheinberg to tender his shares.[7]

We also reverse the district court's orders denying the Epstein plaintiffs' motions for class certification and leave to amend their complaint.

During the pendency of these consolidated appeals, the Delaware Court of Chancery entered a judgment approving the settlement of a state class action that released all claims arising out of Matsushita's tender offer for MCA stock, including the Williams Act claims raised in the Epstein class action. Matsushita argues that the settlement of the Delaware class action precludes the federal claims raised in the Epstein action. We disagree and hold that the settlement of the Delaware class action does not preclude the Epstein class action.

I. Private Right of Action under Section 14(d)(7)

The SEC's statutory authority to promulgate Rule 14d-10 derives from sections 14(d)(6) and 14(d)(7) of the 1968 Williams Act Amendments to the Securities Exchange Act of 1934.

[7] Plaintiffs also argued in the district court and initially on appeal that MCA, Wasserman, and Sheinberg themselves should be held liable for aiding and abetting Matsushita's alleged violation of Rules 14d-10 and 10b-13. The district court dismissed this claim for failure to state a claim. Fed. R. Civ. P. 12(b)(6). In light of *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), the Epstein plaintiffs now concede that the district court's judgment dismissing the aiding and abetting claims against MCA, Wasserman, and Sheinberg must be affirmed. Plaintiff Walter Minton, however, maintains that Wasserman and Sheinberg may still be held liable, notwithstanding *Central Bank*, for *conspiring* to violate Rules 14d-10 and 10b-13. We reject Minton's attempt to avoid Central Bank's restrictions on private aiding and abetting actions by using the label "conspiracy." Nothing in the language of Rule 14d-10, which imposes restrictions on the activities of "bidder[s]," or in the language of Rule 10b-13, which speaks of "person[s] who make[ ] a cash tender offer," suggests that liability may be imposed upon shareholders who are the beneficiaries of a bidder's violation of these rules. We therefore affirm the dismissal of plaintiffs' claims against MCA, Wasserman and Sheinberg.

15 U.S.C. § 78n(d)(6), (7) (1981).[8] Matsushita [9] makes the threshold argument that it cannot be sued by MCA shareholders for violating Rule 14d-10 because Congress did not intend sections 14(d)(6) and 14(d)(7) to be privately enforceable. [10] In advancing this argument, Matsushita asks us to create a conflict

[8] In *Robertson v. Dean Witter*, 749 F.2d 530 (9th Cir. 1984), we held that an agency rule contains a private right of action if Congress intended the statute under which it was promulgated to be privately enforceable. *Id.* at 536. While the parties agree that Rule 14d-10 was promulgated under sections 14(d)(6) and 14(d)(7) of the Williams Act, plaintiffs contend that the SEC also issued the Rule to implement section 14(e). Because we hold that Congress intended section 14(d)(7) to be privately enforceable, we need not address the relationship between section 14(e) and Rule 14d-10.

[9] In its brief, Matsushita did not argue that Rule 14d-10 does not contain a private right of action. Instead, it argued solely that Rule 10b-13 is not privately enforceable. Plaintiffs argue that Matsushita in fact conceded that Rule 14d-10 contains a private cause of action by writing that "[i]n addition to SEC enforcement actions and *Rule 14d-10 claims*, stockholders are further protected by Rule 10b-5...." Brief of Matsushita at 47 (emphasis added). Matsushita, however, denies that it made such a concession. *See* Supplemental Brief of Defendants-Appellants at 11 n.11. In a letter submitted to the court several months after oral argument, Matsushita stated that Rule 14d-10 does not contain a private right of action, citing for support *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), and referring to portions of its brief that discuss only Rule 10b-13. Nonetheless, because an argument concerning whether Rule 14d-10 provides a private right of action appears in the Brief of Wasserman and Sheinberg ("Wasserman Brief"), we will give Matsushita the benefit of the doubt and treat its 28(j) letter as incorporating that portion of the Wasserman Brief by reference.

[10] Section 14(d)(6) provides that when more shares are tendered than a bidder is "willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata ... according to the number of securities deposited by each depositor." 15 U.S.C. § 78n(d)(6).

Section 14(d)(7) provides:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

15 U.S.C. § 78n(d)(7).

with the Second and Third Circuits, both of which have held that Congress intended to create a private right of action under section 14(d)(7). *See Polaroid Corp. v. Disney*, 862 F.2d 987, 996 (3d Cir. 1988); *Field v. Trump*, 850 F.2d 938, 946 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *cf. Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.) (holding that section 14(d)(6) also contains a private right of action), *cert. denied*, 479 U.S. 954 (1986). We find the reasoning of the Second and Third Circuits to be persuasive.

In *Field* and *Pryor*, the Second Circuit applied the traditional four-factor *Cort v. Ash* test in deciding whether, in enacting sections 14(d)(6) and 14(d)(7), "Congress intended to create ... by implication ... a private cause of action." *Pryor*, 794 F.2d at 57 (quoting *Touche Ross & Co. v. Redington*, 422 U.S. 560, 575 (1979)). In holding that Congress did intend to create a private right of action the Second Circuit reasoned, first, that both 14(d)(6) and 14(d)(7) "identif[y] [their] beneficiaries and, unlike the bulk of federal securities regulation, confer[ ]a substantive right on those beneficiaries." *Pryor*, 794 F.2d at 57 (cited in *Field*, 850 F.2d at 946). Second, the court found that a private damages remedy was totally consistent with the statutory purpose of protecting injured investors and provided a particularly effective means of enforcing sections 14(d)(6) and 14(d)(7). *Field*, 850 F.2d at 946; *Pryor*, 794 F.2d at 56, 58. Finally, the Second Circuit noted that these claims are not those "traditionally relegated to state law." *Fields*, 850 F.2d at 946; *Pryor*, 794 F.2d at 58.

In *Polaroid*, the Third Circuit relied on *Pryor* and *Field*, but added that the " 'contemporary legal context' informing what Congress perceived itself to be doing when it acted," supported an inference that Congress intended to create a private remedy for violations of section 14(d)(7). *Polaroid*, 862 F.2d at 995 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979)). In 1968, when the Williams Act was enacted, various lower federal courts had construed section 10(b) of the 1934 Act as providing a private cause of action, and the Supreme Court, in *J.I. Case v. Borak*, 377 U.S. 426 (1964), had announced a liberal policy toward inferring private rights of action for securities law

violations generally. See *Polaroid*, 862 F.2d at 995-96. Because Congress enacted the Williams Act in this context, "it is reasonable to conclude that Congress passed the Williams Act with an understanding that courts would construe the Act as creating private remedies that would enforce the provisions of the Act effectively." *Id.* at 996.

Matsushita argues that we should not follow *Pryor*, *Field*, and *Polaroid* because their rationale is inconsistent with our decision in *In Re Washington Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349 (9th Cir. 1987) (en banc) (hereinafter "*WPPSS* "). We reject this argument. In *WPPSS*, we held that section 17(a) of the Securities Act of 1933 did not create a private right of action, *id.* at 1358, but in doing so we hardly sounded the death knell for implied rights of action generally. Instead, like the Second and Third Circuits in *Pryor*, *Field*, and *Polaroid*, we applied the traditional four-factor *Court v. Ash* test, emphasizing two prongs in particular: whether there is an implicit indication, in the statute's language, legislative history, or structure, of legislative intent to create a private remedy, and whether such an implication would be consistent with the underlying legislative scheme.[11] *Id.* at 1353. Like the Third Circuit, further, we focused on the context in which the statute was enacted. *See id.* at 1357 (looking to "contemporary legal context prevailing at the time of any comprehensive reexamination of or significant amendment to" the securities laws in evaluating whether Congress intended to create private right of action under section 17(a) of the 1933 Act). In *WPPSS* we not only found no evidence whatsoever of congressional intent to create a private right of action under section 17(a), but we also indicated that creating an implied private right of action would frustrate the purposes of the legislative scheme. *Id.* at 1355-56. In *Pryor*, *Field*, and *Polaroid*, just the opposite was true.

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[11] In fact, in *WPPSS* we overruled two prior Ninth Circuit cases because of, among other reasons, their failure "to apply the Supreme Court's analysis in *Cort v. Ash*." *WPPSS*, 823 F.2d at 1351.

While we stated in *WPPSS* that we "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide," *id.* at 1353 (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)), we made equally clear that "a private remedy may be inferred from the plain language of the statute, the statutory structure, or some other source." *Id.* The principal difference between this case and WPPSS is the clarity of the statutory language. In *WPPSS*, the statute at issue, section 17(a) of the 1933 Act, states that "[i]t shall be unlawful for any person in the offer or sale of any securities ...(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact...." 15 U.S.C. § 77(q)(a) (1981). Section 14(d)(7), in contrast, specifically endows shareholders with the right to receive any increased consideration offered to other shareholders. It states that whenever any person "varies the terms of a tender offer" by "increasing the consideration offered" to some security holders, "such person *shall pay the increased consideration to each security holder* whose securities are taken up and paid for pursuant to the tender offer ...." (emphasis added). This language, of course, constitutes far more than the "general censure of fraudulent practices" we found insufficient to create an implied right of action in *WPPSS*, 823 F.2d at 1353. Instead, it is "legislation with an unmistakable focus on the benefitted class." *Id.* at 1354.

The structure of section 14(d)(7) also points to Congress' intent to give shareholders the right to sue. If shareholders were not permitted to sue for damages for violations of section 14(d)(7), there would be no way, once a violation has occurred, to enforce the express statutory command that a bidder "shall pay to each security holder" any increased consideration paid to any other security holder.[12] Under section 21(d)(1) of the 1934

[12] Thus section 14(d)(7) stands in sharp contrast with the statute at issue in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), where the Court held that the existence of "elaborate enforcement provisions," including an express citizens suit provision, precluded the inference of additional private causes of action. *Id.* at 14. In contrast, the Williams Act itself contained no remedial provisions whatsoever, despite the fact that its "sole purpose" was the "protection of investors who are confronted with a tender offer." *Pryor*, 794 F.2d at 56 (quoting *Piper v. Chris-*

Act, the SEC's authority to enforce the provisions of the 1934 Act is limited to bringing *injunctive* actions.

Finally, the legal context of section 14(d)(7) of the 1968 Williams Act differed markedly from that of section 17(a) of the 1933 Act. It was not until 1964 that the Supreme Court announced the implied right of action doctrine in *J.I. Case v. Borak*, 377 U.S. 426 (1964). Thus, at the time of passage of the Williams Act, the Court's implied right of action jurisprudence gave Congress reason to think it need not decide the private right of action question itself.

Matsushita also urges us not to follow *Pryor*, *Field*, and *Polaroid* on the ground that these cases are inconsistent with the implied cause of action jurisprudence of the Supreme Court as it exists today. As Matsushita would have us read the Supreme Court's cases, a private right of action would not be recognized unless Congress explicitly created one. For example, Matsushita asserts that the Supreme Court would not interpret section 14(d)(7) as creating a damages remedy for MCA shareholders because Congress did not say explicitly that all "security holders shall have the right to receive" any increased consideration offered to select shareholders. Wasserman Brief at 56.

Matsushita's argument that there has been a recent sea change in the Court's implied right of action jurisprudence is based on wishful thinking, not case law.[13]The argument is essentially the same one advanced by Justice Scalia in his concurring

Craft Indus., 430 U.S. 1, 35 (1977)). Matsushita's reliance on *Nat'l Sea Clammers* in this case is to no avail.

[13] The cases Matsushita does cite simply hold that courts are reluctant to infer causes of action absent an expression of congressional intent. We agree that congressional intent is the touchstone of an implied private right of action, and that a showing of "the utility of the proposed private right," by itself, is insufficient to justify inferring a private cause of action. See Wasserman Brief at 53. At the same time, the Court has stated over and over for the last fifteen years, in the cases Matsushita cites, that "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available," *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979), and that "congressional intent can be inferred from the language of the statute, the statutory

opinion in *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring in the judgment), where he urged his colleagues to "get out of the business of implied private rights of action altogether." *Id.* at 192. The problem is that no other justice of the Court has yet to endorse the "get out of the business" approach to implied causes of action. To the contrary, the Court has only recently reaffirmed the vitality of the *Cort v. Ash* test—which the Second and Third Circuits applied in holding that section 14(d)(7) is privately enforceable—as an aid in "determin[ing] 'whether Congress intended to create the private remedy asserted' for the violation of statutory rights." *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 508 n.9 (1990) (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979)); *Suter v. Artist M.*, 112 S. Ct. 1360, 1370 (1992) (applying "the familiar test of *Cort v. Ash*" in concluding that Congress did not intend to make a private remedy available to enforce the Adoption Assistance and Child Welfare Act). Indeed, in *Thompson v. Thompson*, the case in which Justice Scalia called for an end to implied private rights of action, the eight members of the Court who comprised the majority stated that the existence of a private right of action does not require "evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action." *Thompson*, 484 U.S. at 179. Rather, the Court reaffirmed its long-standing view that "as an *implied* cause of action doctrine suggests," Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.* (internal citation and quotation omitted).[14]

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structure, or some other source...." *Karahalios v. Nat'l Fed. of Fed. Employees, Local 1263*, 489 U.S. 527, 532-33 (1989) (internal citation and quotations omitted).

[14] Moreover, as the Third Circuit stated in *Polaroid*, the Court has been sensitive to the legal context in which Congress legislated. *See Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028, 1036 (1992) (applying "same contextual approach used to justify an implied right of action" to determine scope of available remedies); *Thompson v. Thompson*, 484 U.S. 174, 180 (1988) (examining context of legislation "with an eye toward determining Congress' perception of the law that it was shaping or reshaping"); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381 (1982) (taking into account the "contemporary legal context" to determine whether Congress thought it was creating implied cause of action); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979) (same); *id.* at 718 (Rehnquist, J., concurring) (approving implication of private right of action under Title IX solely because, at time of passage, the Court's implied right of action jurisprudence gave Congress reason to think that it need not decide private right of action question itself).

We therefore reject Matsushita's argument that the rationale of *Pryor, Field*, and *Polaroid* is inconsistent with Supreme Court implied private right of action jurisprudence as it exists today.[15] Like the Second and Third Circuits, we believe that the statutory language—that a bidder "shall pay the increased consideration" to a shareholder who was paid less than another shareholder—is more than adequate under existing Supreme Court case law to support a finding of congressional intent to create a private right of action for violations of section 14(d)(7).

In sum, we hold that in enacting section 14(d)(7) of the Williams Act, Congress intended to provide a damage remedy as a means of enforcing its command that every security holder who tenders his shares be paid any "increased consideration" offered to others.

II. The Wasserman Transaction

Captioned the "Equal treatment of securities holders," Rule 14d-10 prohibits a bidder from making a tender offer that is not open to all shareholders or that is made to shareholders at varying prices.[16] The gist of plaintiffs' claims is that Matsushita

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[15] Matsushita also argues that the Supreme Court's recent decision in *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), requires federal courts to get out of the business of inferring private causes of action from statutes. *Central Bank*, however, is inapposite; it held simply that a private right of action is not available for aiding and abetting actions not authorized by statute.

[16] Rule 14d-10 provides in relevant part:

(a) No bidder shall make a tender offer unless:

(1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and

violated the antidiscrimination requirements of the Rule by paying Wasserman and Sheinberg premiums pursuant to the tender offer.

Negotiations between Matsushita and MCA began in August 1990, when a representative of Matsushita telephoned MCA's financial advisor to express interest in acquiring MCA. During the course of the talks, Matsushita stressed that it wanted Wasserman and Sheinberg to commit their shares to Matsushita in advance of the friendly takeover and to remain in MCA's employment for five years. On the morning of November 26, 1990, Matsushita and Wasserman entered into the Capital Contribution and Loan Agreement, pursuant to which Wasserman agreed to exchange his MCA shares for preferred stock in a subsidiary Matsushita would create called "MEA Holdings."

Performance of the Capital Contribution and Loan Agreement was conditioned on the tender offer in several respects. First, neither Matsushita nor Wasserman was obligated to perform the Agreement if any of the conditions of the tender offer were not satisfied. *See* Capital Contribution and Loan Agreement §7(c), ER 357 Exhibit S at 12. If, for example, Matsushita did not acquire 50% of MCA's common stock as a result of the

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(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer....

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That:

(1) Security holders are afforded equal right to elect among each of the types of consideration offered; and

(2) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

The SEC promulgated Rule 14d-10 in 1986, in part to codify its view that §14(d)(7) of the Williams Act Amendments to the Securities Exchange Act of 1934 contains an all-holders and a best-price requirement. *See* SEC Release No. 34-22198, 1985 SEC LEXIS 1175 at *2 (July 1, 1985) (stating that under Commission's interpretation of §14(d)(7) "(i) a tender offer must be extended to all holders of the class of securities which is the subject of the tender offer (the 'all-holders requirement'); and (ii) all such holders must be paid the highest consideration offered under the tender offer (the 'best price rule')").

tender offer, the Wasserman deal would be off. Second, the timing of performance was tied to the tender offer. The Wasserman exchange was scheduled to take place "immediately following the time at which shares of MCA Common Stock are accepted for payment pursuant to and in accordance with the terms of the offer...." *Id.* §2(a), ER 357 Exhibit S at 4. Third, the amount of cash Matsushita was required to contribute in order to fund MEA Holdings was dependent upon the tender price, with Matsushita agreeing to contribute to MEA Holdings 106% of the "highest price paid ... for any shares of MCA Common Stock pursuant to the [tender] offer." *Id.* at §1(c), ER 357 Exhibit S at 2. Finally, the redemption value of Wasserman's preferred stock was set as the tender price. *Id.* Thus if Matsushita increased the tender price at the last minute in response to a competitive bid for MCA, Matsushita would have been required to increase both its funding of MEA Holdings and the amount paid upon the redemption of the Wasserman preferred stock.

Moments after signing the Capital Contribution and Loan agreement, Matsushita and MCA announced the $71 per share tender offer. Shareholders were given from the time of the announcement until 12:01 a.m. on December 29, 1990 to tender their shares. The owners of 91% of MCA's common stock did so, and at 12:05 a.m., Matsushita accepted all tendered shares for payment. At 1:25 a.m., Matsushita exchanged Wasserman's shares for MEA Holdings preferred stock pursuant to the Capital Contribution and Loan Agreement. MCA was merged into Matsushita as a wholly owned subsidiary on January 3, 1991.

Whether the Wasserman transaction violated Rule 14d-10 depends upon whether Wasserman received greater consideration than other MCA shareholders "during such tender offer," Rule 14d-10(a)(2), or whether he received a type of consideration not offered to other MCA shareholders "in a tender offer." Rule 14d-10(c).[17]

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[17] Rule 14d-10(c)(1) provides that "Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That: (1) Security holders are afforded equal right to elect among each of the types of consideration offered[.]" At oral argument, counsel for Wasserman and Sheinberg argued for the first time and without authority

Matsushita argues that the Wasserman transaction falls outside the Rule's ambit because it closed *after* the tender offer period expired. The tender offer period, Matsushita contends, ended when it accepted the tendered MCA shares for payment—at 12:05 a.m. on December 29, 1990, one hour and 20 minutes before Wasserman's shares were exchanged. In Matsushita's view, liability under Rule 14d-10 boils down to a pure question of timing: the Rule is simply a "mechanical provision" concerned with "payments to shareholders of a target corporation only *during a specifically-defined tender offer period*." Brief of Matsushita at 23 (emphasis in original). Outside that period, Matsushita insists, "Rule 14d-10 is without effect" because the Rule "is engaged (or not engaged) depending upon *when payment is made*." *Id.* at 23, 35 (emphasis in original).

Although Matsushita argues that Rule 14d-10 is designed to operate only during a "specifically-defined tender offer period," neither the phrase "tender offer period" nor a specific time frame is to be found in the Rule's text. To be sure, section (a)(2) of the Rule prohibits paying one security holder more than another

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that section (c)(1) cannot be violated. Counsel contended that rather than an independent prohibition, section (c)(1) is a "savings clause" designed to create an exception to section (a)(2) of the Rule.

We cannot agree. When different *types* of consideration are offered to different holders of the same class of security, it may be difficult for plaintiffs to prove that one package was more valuable than the other, as section (a)(2) requires. Section (c)(1) obviates the need for plaintiffs to do so. It is a prophylactic rule that entitles a court to presume, if a tender offer fails to make the type of consideration offered to some security holders available to all, that the selectively-offered consideration was "higher consideration" for purposes of section (a)(2). This reading of section (c)(1) is supported by the SEC's comments in releasing Rule 14d-10, to which we are obliged to give substantial deference. *See Stinson v. United States*, 113 S.Ct. 1913, 1919 (1993) (agency's interpretation of own regulations must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990), (agency's interpretation of its own regulations is entitled to deference), *cert. denied*, 498 U.S. 1126 (1991). In its release, the SEC stated, under the heading "Alternative Types of Consideration," that "when more than one type of consideration is offered ... [s]ecurity holders ... must be afforded the right to elect among all types of consideration offered." SEC Release No. 34-23421, 1986 SEC LEXIS 1179 at *28 (July 11, 1986).

"during such tender offer." But the term "tender offer," as used in the federal securities laws, has never been interpreted to denote a rigid period of time. On the contrary, in order to prevent bidders from circumventing the Williams Act's requirements, Congress, the SEC, and the courts have steadfastly refused to give the term a fixed definition. Instead, we have held that "[t]o serve the purposes of the Williams Act, there is a need for flexibility in fashioning a definition of a tender offer." *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 950 (9th Cir. 1985).

Even if the language of Rule 14d-10(a)(2) were to provide a measure of support for Matsushita's timing argument, Matsushita would still be unable to account for the language of Rule 14d-10(c), which prohibits a bidder from "offer [ing] ... more than one type of consideration in a tender offer" if shareholders are not permitted to choose between the different types of consideration offered. (Emphasis added). Section (c)(1) makes no mention of payment and no mention of timing. Instead, Rule 14d-10(c)(1) prohibits a bidder such as Matsushita from offering a shareholder, such as Wasserman, not only consideration of greater value than that offered to other shareholders, but also consideration that is different from that offered to other shareholders. It endows each shareholder with the "equal right to elect among each of the types of consideration offered," regardless of when actual payment is made.

The administrative history of Rule 14d-10 underscores how strained Matsushita's timing argument is. It suggests anything but the notion that the SEC intended the Rule to be a mechanical provision concerned not with discriminatory tender offers, but with the timing of payment to favored shareholders. In promulgating Rule 14d-10, the SEC emphasized the need for "equality of treatment among all shareholders who tender their shares." *Id.* at *15 (quoting S. Rep. No. 550, 90th Cong., 1st Sess. 10 (1967)). It further characterized Rule 14d-10 as a substantive provision necessary to achieve the "investor protection purposes of the [1934] Exchange Act" and the Williams Act. SEC Release No. 34-22198, 1985 SEC LEXIS 1175 at *2 (July 1,

1985). At no point in its discussion of the Rule's purposes did the SEC suggest that the Rule's sole focus is the timing of payments.

Matsushita implicitly acknowledges that Rule 14d-10 does not contain a rigid time frame of its own when it urges us to read Rule 14d-10 as incorporating, sub silentio, the time frame set out in Rule 10b-13, which prohibits side purchases "from the time [a] tender offer or exchange offer is publicly announced or otherwise made known ... [to security holders] until the expiration of the period ... during which securities tendered pursuant to such tender offer or exchange offer may by the terms of such offer be accepted or rejected." Matsushita justifies fusing elements of two separate regulations by asserting that "for purposes of the Williams Act and the SEC Rules promulgated thereunder," Rule 10b-13 defines the time period of a tender offer. Brief of Matsushita at 24.

Matsushita offers no authority for incorporating Rule 10b-13's time frame into Rule 14d-10. In promulgating the all-holders, best-price Rule in 1986, the SEC gave no hint that its new regulation would be governed by Rule 10b-13's time clock. Nor does the Williams Act fully incorporate Rule 10b-13's timing provisions. Rule 10b-13 prohibits bidders from making side deals during a fixed period of time; it does not purport to serve as a general definition of when a tender offer begins and ends. In fact, in Rule 14d-2, the SEC rejected the notion that Rule 10b-13 timing determines when tender offers *start* for purposes of section 14(d)(7) and the rules promulgated thereunder.[18]

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[18] Under Rule 14d-2, a tender offer begins for purposes of section 14(d)(7) not from the moment of the offer's announcement (as under Rule 10b-13), but at 12:01 a.m. on the *earlier* of the date the tender offer is publicly announced *or* sent to securities holders. *See* Rule 14d-2(a); Rule 14d-2(b)(2)(ii); SEC Release No. 34-22198, July 1, 1985, 1985 SEC LEXIS at *10, 13. Matsushita claims that this provision of Rule 14d-2 does not apply to claims asserted under Rule 14d-10, as opposed to under section 14(d)(7), but they strain to do so. Rule 14d-10 was promulgated to codify the all-holders and best-price requirements in § 14(d)(7), and the SEC stated when proposing the Rule that the § 14(d)(7), and the time frame would carry over to the Rule. *Id.*

We therefore reject Matsushita's timing argument. Indeed, if adopted, it would drain Rule 14d-10 of all its force. Under Matsushita's reading, even the most blatantly discriminatory tender offer—in which large shareholders were paid twice as much as small shareholders—would fall outside Rule 14d-10's prohibition, so long as the bidder waited a few seconds after it accepted all of the tendered shares before paying the favored shareholders. Rule 14d-10's equality requirements, which "expressly preclude bidders from discriminating among holders of the class of securities that is the subject of the offer, either by exclusion from the offer or by payment of different consideration," SEC Release No. 34-23421, 1986 SEC LEXIS 1179 at *10 (July 11, 1986), cannot be so easily circumvented.

An inquiry more in keeping with the language and purposes of Rule 14d-10 focuses not on when Wasserman was paid, but on whether the Wasserman transaction was an integral part of Matsushita's tender offer. If it was, Matsushita violated Rule 14d-10 because it paid him, pursuant to the tender offer, different, and perhaps more valuable consideration than it offered to other shareholders.[19]

Matsushita contends that the Wasserman transaction cannot be deemed a part of the tender offer because it was merely a private exchange of stock, structured to take place after the tender offer finished. But Matsushita's assumption that the Wasserman transaction was private, rather than a part of the tender offer, begs the question. In *Field v. Trump*, 850 F.2d at 944, the Second Circuit held that "[w]hether [an] acquisition of shares in a corporation is part of the tender offer for purposes of the Act cannot be determined by rubber-stamping the label used by the

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[19] If an ostensibly private agreement that pays a particular shareholder a sum greater than the tender price is deemed a part of the tender offer, the tender offer does not end, by definition, until that agreement is performed. Performance of the agreement, including payment of the shareholder, will therefore take place "during the tender offer," in violation of Rule 14d-10(a)(2). Similarly, if one shareholder is offered a different type of consideration than other shareholders in a transaction that is determined to be a part of the tender offer, the bidder has offered more than one type of consideration "in a tender offer" without affording each shareholder the right to choose the package she prefers, in violation of Rule 14d-10(c)(1).

acquiror." To hold otherwise, the court stated, would render "virtually all of the provisions of the Williams Act, including its filing and disclosure requirements," subject to evasion "simply by an offeror's announcement that offers to purchase ... stock were private purchases." *Id.* Thus, the court observed that because the Williams Act and its implementing regulations do not define the term "tender offer," "[c]ourts faced with the question of whether purchases of a corporation's shares are privately negotiated or are part of a tender offer have applied a functional test that scrutinizes such purchases in the context of various salient characteristics of tender offers and the purposes of the Williams Act." *Id.* at 943-44. *See also* SEC Release No. 34-22198, 1985 SEC LEXIS 1175, at *7 (July 1, 1985) ("[T]he fact that ... different consideration is offered to different holders of the same class of securities, does not mean that a tender offer has not been made under the Williams Act. Rather, if such a transaction is found to be a tender offer, then the tender offer would not have been made in compliance with the all-holders requirement").

Because the terms of the Wasserman Capital Contribution and Loan Agreement were in several material respects conditioned on the terms of the public tender offer, we can only conclude that the Wasserman transaction was an integral part of the offer and subject to Rule 14d-10's requirements. Two facts compel this conclusion: first, the redemption value of Wasserman's preferred stock incorporated the tender offer price by reference, and second, the Capital Contribution and Loan Agreement was conditioned on the tender offer's success. If the tender offer failed, Wasserman would have remained the owner of his MCA stock. This is precisely the arrangement Matsushita made with its shareholders through its public tender offer: if an insufficient number of shares were tendered, each shareholder too would have retained ownership of her MCA stock. The deal Matsushita made with Wasserman thus differed from the tender offer in only one material respect—the type (and possibly the value) of consideration provided. Rule 14d-10(c)(1) forbids just such a transaction.

To be sure, the fact that a private purchase of stock and a public tender offer are both part of a single plan of acquisition

does not, by itself, render the purchase a part of a tender offer for purposes of Rule 14d-10. Rule 14d-10 does not prohibit transactions entered into or effected before, or after, a tender offer—provided that all material terms of the transaction stand independent of the tender offer. Thus a bidder who purchases shares from a particular shareholder before a tender offer begins does not violate Rule 14d-10. *See, e.g., Kahn v. Virginia Retirement Systems*, 13 F.3d 110 (4th Cir. 1993) (bidder's *unconditional* private purchase of target's shares two days before tender offer was formally announced did not violate section 14(d)(7) and Rule 14d-10), *cert. denied*, 114 S. Ct. 1834 (1994).

If, in advance of the tender offer, Wasserman had become unconditionally obligated to exchange his MCA shares, the transaction would not have violated Rule 14d-10, even if Matsushita believed that acquiring Wasserman's shares was a first step in acquiring MCA. In such a case, both Wasserman and Matsushita would have assumed the burdens of their agreement despite the risk that an anticipated tender offer would fail, or command a different price. But such a course was not followed. Matsushita sought to acquire MCA *without* purchasing the holdings of individual shareholders block by block and accordingly subjecting itself to the risk that it would end up with a huge investment in MCA stock, but without control. The tender offer device is designed to avoid this risk, but only if holders of the same security are offered precisely the same consideration.

Matsushita argues, in the alternative, that the summary judgment should be affirmed because plaintiffs cannot prove that they suffered injury from the Wasserman deal. This argument, however, confuses the question of whether Matsushita complied with Rule 14d-10 with the question whether plaintiffs may recover damages. By paying Wasserman consideration that it failed to offer to other shareholders, Matsushita violated Rule 14d-10(c)(1). It remains to be determined on remand whether the preferred stock Wasserman received had a value greater than $326,959,182, the value of his 4,953,927 shares at the cash tender price of $66 per share.[20]

[20] Plaintiffs alleged in their complaint that Wasserman received consideration of greater value per share than other shareholders. Matsushita did not

Accordingly, we reverse the summary judgment in favor of Matsushita on plaintiffs' claim that the Wasserman transaction violated Rule 14d-10, reverse the district court's order denying plaintiffs' motion for partial summary judgment that the Wasserman transaction did violate Rule 14d-10, and remand for further proceedings on the question whether the consideration Wasserman received in exchange for his MCA stock had a greater value than what plaintiffs received and, if so, how much greater.

III. The Sheinberg Payment

Unlike Wasserman, Sheinberg tendered his MCA shares for the $71 per share tender price. Pursuant to an amended employment agreement executed shortly before the tender offer was announced on November 26, 1990, MCA agreed, with Matsushita's approval, to pay Sheinberg $21 million if the tender offer succeeded. Two days after Matsushita accepted all tendered MCA shares, Sheinberg received the promised payment.

The parties dispute the purpose of the Sheinberg payment. Plaintiffs contend that it constituted a covert premium of $17.80 per share designed to induce Sheinberg to tender his shares. Matsushita contends that the payment was instead designed both to cash out stock options that MCA had given Sheinberg because

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dispute this allegation in its motion for summary judgment. Moreover, in opposing Matsushita's summary judgment motion, plaintiffs stated, on the basis of the calculations contained in Matsushita's expert witness affidavit and on the fact that dividend payments are not tax-deductible, that Wasserman's preferred stock may have cost Matsushita more than $66 per share in cash. Plaintiffs also point to their own expert's answers to interrogatories that state that Wasserman's preferred stock was in fact worth more than $66 per share. These answers to interrogatories are not in the record because Matsushita did not controvert plaintiffs' allegation that Wasserman's preferred stock was worth more than $66 per MCA share he exchanged. On this record, we believe that plaintiffs have raised a genuine issue of fact as to whether Matsushita gave Wasserman consideration worth more than $66 per share. Matsushita also asserts that to recover damages, plaintiffs must prove not only that they received less consideration package given solely to Wasserman. The plain language of Rule 14d-10 is to the contrary. It requires plaintiffs to prove, as a prerequisite to recovering damages, simply that the consideration paid to Wasserman was "higher" than that paid to other shareholders. We express no view at this time as to the value, if any, that may be attributed to tax benefits Wasserman may have received.

of his performance as its chief operating officer and to compensate Sheinberg for agreeing to amend his employment contract with MCA.

According to the minutes of the MCA Board of Director's meeting of November 25, 1990, the day before the tender offer was announced, Wasserman explained that before discussions with Matsushita began, he had intended to grant Sheinberg options for 1,000,000 shares of MCA stock. ER 357 Exhibit D. He stated, according to the minutes, that when merger negotiations began, "there had been a freeze put on further stock option grants," and he was therefore unable to propose the Sheinberg options at the next meeting. *Id.* at 31. According to the minutes, Wasserman said he believed that it would be unfair to deprive Sheinberg of his legitimate expectations simply because the tender offer was nearly finalized. *Id.* He recommended that the options be granted at an exercise price of $50 per share. *Id.*

Wasserman also told the Board that Matsushita had approved of the Sheinberg options and that it had agreed to give Sheinberg "cash payments if the transaction went forward, measured by the difference between the transaction price" and the $50 option price. *Id.* at 31-32. Martin Lipton, counsel for MCA, Wasserman, and Sheinberg in this transaction, told the Board that Sheinberg's payment would amount to $21 million and that, as further consideration for Matsushita's promise to pay him this sum, Sheinberg would be required to waive his right to severance pay in the event Matsushita acquired MCA and to agree to five years of continued employment. *Id.* at 33. The Stock Awards Plan Committee approved the "arrangements" Wasserman proposed for Sheinberg, "subject to the Board's approval of the proposed merger agreement." *Id.* at 68.

Plaintiffs argue that the Sheinberg payment was entirely conditional upon the success of the tender offer. If the tender offer did not succeed, it is undisputed that Sheinberg would not have received the $21 million. Matsushita points to no evidence in the record indicating that the grant of options to Sheinberg was anything more than hypothetical in the event that the tender offer did not succeed. At the MCA Board meeting, according to the minutes, Wasserman stated that if the merger "did not occur,

he would present the arrangements to the Board for approval and implementation as stock-based awards." *Id.* at 32. From this record a trier of fact could infer that Wasserman's statement was merely a declaration of future intention, not a binding commitment to give Sheinberg stock options regardless of the outcome of the tender offer.

Plaintiffs also point to the absence of any evidence even suggesting that Sheinberg might be in line for an award of stock options before November 25, 1990, the eve of the tender offer. Moreover, they cite the deposition testimony of MCA's financial advisor, Felix Rohatyn, that he could not recollect any discussions of a stock option award to Sheinberg until Wasserman brought up the matter at the November 25 Board Meeting. ER 357 Exhibit A at 32.

Plaintiffs also argue that Matsushita's account of the Sheinberg payment is internally inconsistent. If Matsushita is correct that Sheinberg owned—prior to the day the tender offer was announced—options for 1,000,000 shares of MCA stock, each with an exercise price of $50 per share, it is unclear why Matsushita would claim that the Sheinberg payment was also made in consideration of an agreement to amend his employment contract. The $21 million is ostensibly derived from the difference between the $50 exercise price and the $71 tender price, multiplied by the 1,000,000 option shares.

We hold that plaintiffs' circumstantial evidence gives rise to a disputed issue of material fact and therefore precludes summary judgment for Matsushita on the claim that the $21 million payment to Sheinberg violated Rule 14d-10. A trier of fact could decide, on the evidence cited by plaintiffs, not to credit Matsushita's explanation for the Sheinberg payment.

Matsushita argues, without controverting any of plaintiffs' evidence, that the Sheinberg payment did not violate Rule 14d-10 because (1) the Sheinberg payment was made *after* Matsushita accepted the tendered MCA shares, and (2) the payment was made by MCA, not Matsushita.

We rejected Matsushita's timing argument in the context of the Wasserman transaction, *see* Part II, *supra*, and the fact that

Matsushita repeats the argument in defending the Sheinberg payment only brings into sharp relief its lack of merit.

Moreover, Matsushita's assertion that MCA rather than Matsushita paid Sheinberg[21] begs the question. The central issue regarding the legality of the Sheinberg payment, after all, is whether it constitutes incentive compensation that MCA wanted to give Sheinberg independently of the Matsushita deal, or a premium that Matsushita wanted to give Sheinberg as an inducement to support the tender offer and tender his own shares. The mere fact that MCA cut Sheinberg's $21 million check just before it was formally merged into Matsushita may be a relevant fact, but it does not establish as a matter of law that the $21 million Sheinberg payment did not violate Rule 14d-10.

Because Matsushita's liability under Rule 14d-10 for the Sheinberg payment turns on disputed questions of material fact, we vacate the summary judgment for Matsushita on this claim and remand for further proceedings. *See* Fed. R. Civ. P. 56(c).

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[21] The only authority Matsushita cites for this argument is *Kramer v. Time Warner*, 937 F.2d 767 (2d Cir. 1991). *Kramer*, however, is inapposite. That case involved Time Incorporated's two-step acquisition of Warner Communications: first a tender offer, then a statutory merger. Time acquired 51% of Warner's common stock pursuant to the tender offer and the remaining 49% pursuant to the second-step statutory merger.

The Second Circuit held that Rule 14d-10 was not violated when Warner paid its top executives different consideration than ordinary shareholders received in the second-step statutory merger. The court reasoned that a statutory merger following a successful tender offer for 51% of a target's shares is not a tender offer for purposes of the Williams Act. *Id.* at 779. Distinguishing *Field v. Trump*, 850 F.2d at 938 (holding that claim exists under Williams Act when offeror withdraws initial tender offer on the same evening he privately secures dissident shareholders' stock only to then renew tender offer next morning), the Second Circuit held: "The claim that the Williams Act applies to second-step statutory mergers is ... meritless." *Id.* The instant case is distinguishable from *Kramer* for the same reason *Field v. Trump* is. As in *Field v. Trump*, no statutory merger, only a tender offer, is involved here.

IV. The Preclusive Effect of the Settlement of the Delaware Class Action

Before addressing the Epstein plaintiffs' argument that the district court abused its discretion in denying their motion for class certification, we consider Matsushita's claim that the Epstein class action is barred by the judgment of the Delaware Court of Chancery settling the state class action. Although the Delaware class action was based exclusively on state law claims, the settlement agreement expressly stated that the federal securities law claims asserted in the "*Epstein* action ... are hereby compromised, settled, released and discharged with prejudice...." *In re MCA, Inc. Shareholder Litig.*, Order and Final Judgment (No. 11740) (Feb. 22, 1993), at 3-4.

Matsushita makes a two-pronged preclusion argument. First, it argues that the Delaware judgment releasing the federal claims is entitled to preclusive effect as a matter of full faith and credit. Second, Matsushita argues that the release of the federal claims bars the Epstein action as a matter of contract.[22]

A. The Delaware Settlement

The Delaware class action was filed on September 26, 1990, the day the financial press reported that Matsushita was negotiating to buy MCA. The suit named as defendants MCA and its directors, including Wasserman and Sheinberg. The essence of the complaint was that MCA's directors had breached their fiduciary duties by failing to implement a market check mechanism to maximize shareholder value upon a change of corporate control, as required by *Revlon, Inc. v. MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173, 182 (Del. 1986).

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[22] The settlement agreement permitted state class members to opt out. Although the Epstein plaintiffs did not opt out, 19 shareholders, including plaintiff-appellant Walter Minton, chose to do so. It is undisputed that shareholders who opted out may continue to pursue their federal claims regardless of the preclusive effect of the Delaware settlement on the Epstein class action.

On December 2, 1990, three days after public disclosure of the terms of the tender offer, the Epstein class action was filed in the Central District of California. Unlike the state action, the Epstein complaint named Matsushita as a defendant and claimed that the tender offer violated SEC Rules 14d-10 and 10b-3.

On December 4, 1990, the day after the Epstein action was filed in the Central District, lead counsel for the Delaware plaintiffs transmitted a letter to MCA's counsel that was to serve as the basis of an amended complaint. In that letter, the Delaware plaintiffs stated their intention to add additional claims against all directors. In particular, the complaint was amended to allege that MCA was wasting corporate assets by increasing its exposure to liability for violations of Rules 10b-13 and 14d-10, that directors Wasserman and Sheinberg had breached their fiduciary duties by negotiating preferential deals with Matsushita, and that MCA failed to make full disclosure of the benefits MCA insiders would receive from the takeover. Finally, Matsushita was added as a defendant and charged with conspiring with and aiding and abetting MCA directors in violating Delaware law.

On December 11, 1990, a week after Delaware class counsel's letter proposing to amend the complaint and add Matsushita as a defendant, the defendants reported to the Central District that they had reached a settlement of the Delaware class action "in principle." On December 14, the amended complaint was filed in the Court of Chancery, and on December 17, the parties agreed on the terms of a settlement to be submitted to the Vice Chancellor for approval. The settlement provided for the payment of $1,000,000 in fees to class counsel, but no monetary benefit for class members. The only arguable benefit to class members was a proposed change in the poison pill of the new corporation that was to be formed to own MCA's radio station if the tender offer succeeded. The Vice Chancellor found the value of this poison pill provision to class members to be "illusionary." *See In re MCA Shareholder Litig.*, Inc., 598 A.2d 687, 696 (1991). Finally, the settlement provided for the release of all claims arising out of the tender offer, both state and federal.

In defending the settlement before the Vice Chancellor on January 30, 1991, class counsel argued that the state claims, while not frivolous, had little merit. Counsel also argued that the federal claims were frivolous and should not be pursued. On April 22, 1991, the Vice Chancellor disapproved the proposed settlement. He agreed with class counsel that the state law claims being compromised were "at best, extremely weak and, therefore, have little or no value." *In re MCA, Inc. Shareholder Litig.*, 598 A.2d at 694. In particular, he found the state claim of preferential treatment for Wasserman and other directors to be "weak" because no such state cause of action existed. *Id.* Under Delaware law, the Vice Chancellor noted, "[a] shareholder is not prohibited, by his status as a director, from dealing in shares of the corporation," and that a director breaches his duty of loyalty only if he uses inside information for his personal benefit. *Id.* Finding that the value of the settlement to the class lacked any "real monetary benefit," the Vice Chancellor rejected the settlement because of the "significant value" of the federal claims that would have been released along with the valueless state claims. *Id.* at 696, 690.

Despite the Vice Chancellor's opinion that the state claims had no merit and no value, Matsushita and its co-defendants took no action to dismiss the Delaware action. In fact, the docket of the Court of Chancery reflects no action of any kind—no discovery, no motions, no settlement or status conferences—until after the Central District awarded summary judgment to the defendants in the federal actions in February, 1992, more than a year after the Vice Chancellor disapproved the original Delaware settlement.

On October 22, 1992, after the federal plaintiffs filed their notices of appeal of the summary judgment to the Ninth Circuit, the parties to the Delaware action entered into a new settlement agreement. It provided for the creation of a $2 million settlement fund, enough to pay shareholders two to three cents per share *before* payment of fees and costs.[23] Like the first settlement

[23] Class counsel's request of over $691,000 in fees was reduced by the Vice Chancellor to $250,000, which in turn reduced the amount available for class members to $1,750,000.

agreement, the second agreement provided for the release of all claims arising out of Matsushita's acquisition of MCA, both state and federal. Unlike the first agreement, the second settlement agreement permitted class members to opt out.[24]

The Vice Chancellor approved the second settlement agreement, concluding that "it is in the best interests of the class to settle this litigation and the terms of the settlement are fair and reasonable — although the value of the benefit to the class is meager." *In re MCA, Inc. Shareholder Litig.*, 1993 WL 43024, at *1 (Del. Ch. Feb. 16, 1993). He approved the second settlement for the sole reason that the federal claims which he originally thought had "significant value," had been reduced to "minimal economic value" by the summary judgment entered in the Central District. The Vice Chancellor uncritically accepted the summary judgment as having destroyed the value of the federal claims without considering the fact that the Ninth Circuit reviews summary judgments de novo. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 629 (9th Cir. 1987). The Vice Chancellor downgraded the value of the federal claims even as he expressed reluctance to assess the merits of those claims because they were "outside the jurisdiction of this Court." *Id.* at *4.

Objectors argued that the settlement was collusive because the defendants "cut a deal" with the named plaintiffs in the Delaware action and their attorneys in order to extinguish the claims pending in the federal litigation. *In re MCA, Inc. Shareholder Litig.*, WL 43024, at *5. The Vice Chancellor acknowledged that the potential for this type of abuse "clearly exists in representative litigation," and that "suspicions abound" when "the settling parties have previously proposed a patently inadequate settlement in which the class would have received no monetary benefit but the attorneys would have received $1 million in fees." *Id.* at *4. Nonetheless, he refused to make a finding of collusion on the record before him because objectors "offered no evidence of any collusion." *Id.* at *5.

[24] Notice describing the settlement was sent to all class members, which included the Epstein plaintiffs. None of the Epstein plaintiffs appeared in the Delaware court to object to the terms of the settlement.

The judgment incorporating the terms of the settlement was summarily affirmed by the Delaware Supreme Court. *In re MCA, Inc. Shareholders Litig.*, 633 A.2d 370 (Del. 1993).

B. The Full Faith and Credit Question

1. *The Jurisdiction of State Courts to Release Exclusively Federal Claims in a Class Settlement*

Matsushita first argues that the Epstein action is precluded because the Delaware judgment releasing the federal claims is entitled to full faith and credit. As a general rule, the Full Faith and Credit Act, 28 U.S.C. §1738, "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). This rule does not apply, however, if the state court "did not have jurisdiction over the subject matter or the relevant parties." *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accidental Health Insurance Gty. Ass'n*, 455 U.S. 691, 704-705 (1982). *See also Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 283 (1980); *Durfee v. Duke*, 375 U.S. 106, 110 (1963); *Grubb v. Public Util. Comm'n*, 281 U.S. 470, 475 (1930); *Thompson v. Whitman*, 85 U.S. 457, 469 (1873).[25] The Epstein plaintiffs argue that the Delaware class

[25] The Delaware Court of Chancery determined that it was jurisdictionally competent to enter a judgment settling the class action. As a general rule, we are not at liberty to entertain a collateral attack on a state court's determination of its own subject matter jurisdiction. *See Durfee v. Duke*, 375 U.S. at 111. As the Supreme Court went on to say in *Durfee*, however, "the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling." *Id.* at 114. The *Durfee* Court concluded that when "the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its own jurisdiction," collateral attack on a state court's exercise of jurisdiction is warranted. *Id.* at 114 n.12.

In this case the policy of finality of judgments is plainly outweighed by the federal interest in reviewing a state court's exercise of judicial power over claims which Congress has vested exclusively in federal courts. Section 14(d)(7) of the Williams Act, granting exclusive jurisdiction to the federal courts, embodies beyond cavil, "a highly important federal policy calling for unified and comprehensive proceedings in federal court." *Wright & Miller* § 4428, at 285. *See Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985). When Congress has expressly denied state courts jurisdiction over an important area of federal law, and a state court nonetheless exercises judicial power over it, the potential for disrupting the distribution of governmental power is great. In such a context, the doctrine of federal pre-emption would control, and collateral attack on the state court's exercise of jurisdiction would be appropriate. *See Durfee*, 375 U.S. at 114.

settlement is not entitled to full faith and credit to the extent it released federal claims which are beyond the subject matter jurisdiction of state courts.

Matsushita responds that courts have uniformly held that

> a state court class action settlement properly may preclude, by release, continued litigation by members of the class of all claims—state or federal, whether or not within the exclusive jurisdiction of the federal courts—arising out of the same subject matter or transaction.

Supplemental Brief of Matsushita at 13. In other words, Matsushita reads existing case law as sanctioning the release of exclusively federal claims in the settlement of state class actions as long as the state and federal claims arise out of the same subject matter or transaction. We believe Matsushita's argument represents an overly expansive reading of the case law. As we read the cases, they support only a limited state court power to release exclusively federal claims in a class action settlement.

Of all the cases cited by Matsushita, only two, *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S.Ct. 480 (1994) and *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), implicate the Supremacy Clause because in each, as here, a state court extinguished exclusively federal claims in settling a state class action.[26]

[26] Matsushita also relies on one case, *Abramson v. Penwood Investment Corp.*, 392 F.2d 759 (2d Cir. 1968), which did not involve a class action. We deal with this case in the section addressing Matsushita's contract bar argument. *See infra* note 32.

In every other case cited by Matsushita, the state court had subject matter jurisdiction to adjudicate all the claims that were released in the class settlement. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287-89 (9th Cir.), *cert. denied*, 113 S.Ct. 408 (1992), for example, did not present the question of the preemptive effect of an exclusive federal jurisdiction statute on the power of a state court to release exclusively federal claims in settling a class action. Rather it involved the settlement of a *federal* class action based upon alleged violations of the federal securities laws. Our holding in *Class Plaintiffs* was that the Eleventh Amendment did not bar a federal district court from releasing claims against the State of Washington as part of a class settlement because the State had waived its sovereign immunity by participating in the settlement negotiations and consenting to be bound by the settlement agreement. *Id.* at 1289.

For the same reason, *In Re Corrugated Container Antitrust Litig.*, 643 F.2d 196 (5th Cir. 1981), did not implicate the Supremacy Clause because the jurisdictional competence of a state court to release exclusively federal claims was not at issue. The holding of the Fifth Circuit was that a federal district court, in approving a class settlement of federal claims, had jurisdictional competence to extinguish state claims that were not pleaded, but which it had pendent jurisdiction to adjudicate. 643 F.2d at 221 n.39.

TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982), was also not a Supremacy Clause case because it too involved the approval of a class action settlement by a federal district court. In *TBK Partners*, the Second Circuit upheld a class settlement that extinguished state claims that were not pleaded and arguably beyond the jurisdiction of the district court to adjudicate. *Id.* at 460. Although not directly on point because it was not a preemption case—it did not involve the release of exclusively federal claims by a state court—*TBK Partners* is useful authority because it announced a principled test for limiting the preclusive effect of a judgment based upon a class settlement. Writing for the court, Chief Judge Newman reasoned,

> we see no reason why the judgment upon settlement cannot bar a claim that would have to be based on the *identical factual predicate* as that underlying the claims in the settled class action. We have previously "assume[d] that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint *but depending [[[][on the very same set of facts." National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 n.7 (2d Cir. 1981).

Id. at 460 (emphasis added). Thus the Second Circuit gave preclusive effect to the settlement judgment's release of unpleaded state claims because the same facts were "at the core" of both the unpleaded state and the pleaded federal claims. *Id.* Had the judgment been based upon an adjudication rather than a settlement of the federal claims, the unpleaded state law claims would have been barred by the doctrine of issue preclusion because they turned on the "very same set of facts."

In applying an issue preclusion test to limit the preclusive effect of a judgment approving a class settlement, *TBK Partners* followed Judge Friendly's reasoning in *National Super Spuds*: " '[i]f a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." ' *Id.* at 462 (quoting *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d at 18). Thus, in *TBK Partners*, the Second Circuit upheld the release of unpleaded claims in a settlement judgment which would have been barred by the issue preclusive effect of a judgment based upon an adjudication of the pleaded claims.

As we read *TBK Partners*, Matsushita's reliance on it as "dispositive" authority for its argument that we should give preclusive effect to the Delaware settlement judgment merely because the state and federal claims arise out of the same transaction is completely misplaced. First, *TBK Partners* is not a Supremacy Clause case. Second, *TBK Partners* announced and applied an issue preclusion test, not an "arising out of the same transaction" test, in defining the limits on a court's power to

release claims in a class settlement. As the Second Circuit summed up in *TBK Partners*:

> [w]e therefore conclude that in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim *based on the identical factual predicate* as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.

Id. at 460 (emphasis added).

We now turn to the only two cases cited by Matsushita that involved the preclusive effect of a state court judgment approving a class action settlement that included a release of exclusively federal claims. In both cases *TBK*'s issue preclusion test was applied; in neither case was Matsushita's "arising out of the same transaction" test applied. In *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d at 29, the First Circuit, citing *TBK Partners*, applied an issue preclusion test in holding that the release of exclusively federal claims in a state court settlement judgment was entitled to preclusive effect. Tracking the reasoning of both *TBK Partners* and *National Super Spuds*, the First Circuit's rationale was that the federal claims depended on the same underlying facts as the state claims — the failure of a corporation to disclose allegedly material facts in a proxy statement. *Id.* at 30-31, 33.

In *Grimes v. Vitalink Communications Corp.*, 17 F.3d at 1553, the Third Circuit followed the First Circuit's lead in Nottingham Partners in applying *TBK Partners'* issue preclusion test. The district court, citing *TBK Partners and Nottingham Partners*, had held "that this federal securities case is barred by the collateral estoppel effect of the Delaware judgment [releasing those claims as part of a class settlement]...." *Id.* at 1556. The Third Circuit affirmed because the "facts that underlie the federal non-disclosure claims were actually litigated during the state court proceeding and were conclusively resolved against the objectors, here the federal plaintiffs." *Id.* at 1562.

Thus, the cases cited by Matsushita fail to support its contention that we should give preclusive effect to the Delaware settlement judgment because the federal claims it released arose out of the same transaction as the state claims. Instead, these cases stand for a more restrictive limitation on the power of state courts to extinguish exclusively federal claims in approving class action settlements: a state court may release exclusively federal claims that would have been extinguished by the issue preclusive effect of an adjudication of the state claims.

National Super Spuds and *TBK Partners* together provide the doctrinal framework for using issue preclusion in determining the limits of judicial authority to release unpleaded claims in settling class actions. But though neither *National Super Spuds* nor *TBK Partners* involved the preemptive effect of an exclusive federal jurisdiction statute on the reach of state judicial power in settling class actions, both involved the release of unpleaded state claims by federal district courts which had or may have had pendent jurisdiction to adjudicate the claims. Nonetheless, in both cases the Second Circuit recognized the importance of limiting judicial authority generally to release unpleaded claims in class settlements.

Nottingham Partners and Grimes, in contrast, did implicate the Supremacy Clause because, as in the instant case, exclusively federal securities claims were extinguished by a state court judgment approving a class settlement. In both cases, the judgment was given preclusive effect because the state and federal claims arose out of the identical factual predicate. In other words, had the judgment followed an adjudication rather than a settlement, it would necessarily have resolved the federal claims as a matter of issue preclusion.

In deciding the preclusive effect of the Delaware judgment at issue in this case, we need not decide whether to follow *Nottingham Partners and Grimes* in giving preclusive effect to a class action settlement that releases exclusively federal claims that turn on the same underlying facts as the state claims. All we need decide today is whether to break new ground in giving preclusive effect to a state court judgment that extinguishes exclusively federal claims that are factually unrelated to the state

claims pleaded in the class action.[27] The question of first impression confronting us is whether Congress, in denying state courts subject matter jurisdiction over 1934 Act claims, intended to leave state courts with the power to extinguish exclusively federal claims by approving a class action settlement that could not have been extinguished by adjudicating the class action. We can imagine no reason for imputing such an intent to Congress. We recognize that Congress could reasonably have been concerned about accommodating the interests of state courts in "achiev[ing] a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action," *TBK Partners*, 675 F.2d at 462, but that concern would not be served by authorizing state courts to settle questions *not* at the core of a class action.

The very cases Matsushita relies upon counsel against an expansive state court power to release exclusively federal claims. In applying an issue preclusion test rather than a "same transaction" test, the cases embrace Judge Friendly's common sense reasoning that a court's jurisdiction to extinguish claims by class settlement should not exceed its jurisdiction to extinguish claims by adjudication. Ignoring this reasoning, Matsushita asks us to impose a "same transaction" test without offering logic or precedent in support of such a test.[28] As we shall now show, the federal claims extinguished by the Delaware judgment could not have been extinguished by the issue preclusive effect of an adjudication of the state claims because, although the federal and state claims arose out of the same transaction, they are based upon different underlying facts.

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[27] See *infra* part IV.B.2.

[28] The "arising out of the same transaction" test is, of course, used in claim preclusion doctrine. *See* Restatement (Second) of Judgments § 24 (1981). However, Matsushita, as it must, expressly disclaims reliance on claim preclusion. *See Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir. 1975) (state court judgment can have no claim preclusive effect on exclusively federal securities claims).

2. *The Disparity Between the State and Federal Claims*

Matsushita makes no attempt to argue that any of the Williams Act claims of the Epstein plaintiffs share any predicate facts in common with the state law claims that formed the basis of the Delaware class action. Instead, Matsushita rests its preclusion argument solely on the fact that the claims arose out of the same transaction—Matsushita's acquisition of MCA.

The gravamen of the federal class action is that Matsushita violated SEC Rules 14d-10 and 10b-13 by offering greater value for the stock of Wasserman and Sheinberg than it offered for the stock of other shareholders.[29] Thus the legal theory underlying the federal claims is that Matsushita breached a duty to shareholders that is imposed on tender offerors by federal securities laws. The relevant factual inquiry is whether Wasserman and Sheinberg received greater consideration than other MCA shareholders during the tender offer, section 14d-10(a)(2), or a type of consideration not offered to other MCA shareholders. § 14d-10(c)(1).

The gravamen of the state class action is that MCA directors breached their fiduciary duty of care to MCA as imposed by Delaware law. First, the Delaware plaintiffs claimed that MCA's directors breached their fiduciary duty by failing to take steps to maximize shareholder value upon a change of corporate control as required by *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d at 182. Plainly, this *Revlon* claim turns on different fact issues than the federal securities claims do. The question whether the MCA directors took the steps required by *Revlon* to assure maximum shareholder value is completely distinct from the question whether Matsushita violated the Williams Act by extending preferential treatment to some of the shareholders in making the tender offer.

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[29] Wasserman, Sheinberg, and MCA were also named as defendants and charged with aiding and abetting Matsushita. *See supra* note 7. Because the Epstein plaintiffs concede that the district court's dismissal of this claim was appropriate, we do not address this claim further.

The second state claim was that MCA's directors breached their duty of candor by failing to disclose to the shareholders information concerning the merger such as the compensation packages MCA officers received under the terms of the merger agreement. But whether or not the MCA directors breached their fiduciary duty by failing to make disclosures has no bearing on whether directors received preferential treatment from Matsushita in violation of the Williams Act.[30]

The third state claim was that the defendants breached their fiduciary duty of loyalty by making preferential arrangements for themselves as part of the tender offer, and that Matsushita aided and abetted the MCA defendants in this breach. At first glance, this claim appears to be at least in the same ball park as the Rule 14d-10 claim. However, although this state claim is no doubt artfully drafted to resemble the 14d-10 claim, there is in fact no Delaware statutory or common law rule that prohibits a shareholder from obtaining the best deal for himself as part of a change of corporate control.[31] Thus, adjudication of the claim

[30] The Delaware plaintiffs also alleged that MCA and Matsushita "subjected MCA to potential liability under Rules 14d-7, 14d-10, 10b-13, and 13e-3, ... thereby causing MCA to expend and waste corporate assets...." Amended Complaint at 11. There is, to state the obvious, no cause of action in Delaware for violating the federal securities laws, and there would thus be no issue preclusion if these claims were litigated on the merits in Delaware. Indeed, the Delaware Vice Chancellor did not address the settlement value of these claims in his opinion. The fact that the lawyers for the Delaware plaintiffs inserted such a claim into their amended complaint (not to mention that they did so the day after the *Epstein* action was filed) does little more than make readily apparent the extent to which the state suit was structured with an eye toward the preclusive effect it might have on the federal claims pending in the Central District of California.

[31] In rejecting the first proposed Delaware settlement, the Chancery Court observed that a shareholder is only prohibited from negotiating a preferential deal for himself if he uses inside information to do so. *In re MCA, Inc. Shareholder Litig.*, 598 A.2d at 694. Indeed, as Wasserman and Sheinberg rightly observe, under Delaware law, "Wasserman would have been fully entitled to have held out for a premium in return for agreeing to sell his own MCA shares to Matsushita." Brief of Wasserman and Sheinberg at 14; *see also Citron v. Steego Corp.*, 1988 Del Ch. LEXIS 119, at *21 (Del. Ch. Sept. 9, 1988) (Allen, C.) ("Our law does not regard a control premium as a corporate asset that must be shared among all shareholders"). Rule 14d-10, in contrast, does prohibit a shareholder from receiving more, or even different, consideration in the course of a tender offer. Unlike Delaware law, it does prohibit the payment of control premiums in the course of a tender offer. Indeed, Rule 14d-10 was promulgated precisely to prohibit practices that Delaware permits. *See Polaroid Corp. v. Disney*, 862 F.2d 992.

would not have raised a question of fact whether Wasserman or Sheinberg received preferential treatment from Matsushita.

In sum, the state and federal claims are completely disparate. The only thing they share in common is that they arise out of the same transaction, which is the sole nexus Matsushita relies upon in arguing that the Delaware judgment's release of the federal claims is entitled to full faith and credit.

Since the Delaware class action settlement judgment in this case attempted to extinguish exclusively federal claims which it could not have extinguished through adjudication, we hold that the decree exceeds the jurisdiction of the state court and, therefore, is not entitled to full faith and credit.

C. The Contract Bar Argument

Matsushita argues that regardless of the "technical res judicata effect" of the Delaware judgment, the Epstein plaintiffs are barred from litigating their Williams Act claims in federal court as a matter of contract. As Matsushita puts it, "just as an individual plaintiff may, as a part of a settlement in state court, agree to release exclusively federal claims, so, too, may a class give such a release as part of a judicially approved class settlement." Brief of Matsushita at 20.

This attempt to equate class settlements with the settlement of traditional litigation by individual parties falls short. Matsushita is correct, of course, that individual plaintiffs may release whatever claims they choose in settling traditional non-class litigation, whether or not related to the claims asserted in the pleadings. Because court approval of ordinary settlements is not required, the amount and form of consideration a party is willing to give or receive to settle a case is a matter of judicial indifference. Whether the forum court has jurisdiction over the claims a

party chooses to release in settling traditional litigation is irrelevant. *See Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383 (9th Cir. 1978) (an individual litigant who releases exclusively federal claims as part of a settlement of a state action may not relitigate them in federal court). Indeed, general releases are commonly exchanged between individual litigants in settlements.

However, the settlement of a class action is fundamentally different from the settlement of traditional litigation.[32] First, Matsushita is simply wrong to assert that a "class" may give a release as part of a settlement. A class is not an entity that has rights; the rights belong to the class members. But class members, unlike individual litigants in traditional lawsuits, are bound by the settlement even though they do not individually consent to its terms. Instead, consent is given by class representatives, who derive authority to represent members not by obtaining their consent, but by obtaining a court order designating them the representatives.

Second, class members may only give a release as part of a *judicially approved* settlement. Class representatives lack the "power to give a release of the class rights" on their own, *absent*

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[32] Furthermore, class actions are different from derivative actions, such as that at issue in *Abramson v. Penwood*, 392 F.2d 759 (2d Cir. 1968). Matsushita relies on *Abramson* as authority for the proposition that a class action settlement may release exclusively federal claims regardless of the limited subject matter jurisdiction of the forum court. However, *Abramson* was not a class action. Rather, it involved a shareholder derivative action that included the release of exclusively federal claims owned by the real party in interest, the corporation. This case is inapposite because of the essential difference between a shareholder derivative action and a class action. As Judge Friendly pointed out in a later case, there is a

> fundamental difference between derivative suits and class actions. The plaintiff in a derivative suit is suing on behalf of a corporation. In a derivative suit settlement ... the legal entity whose unpleaded claims are being released—*the corporation—is a party to the settlement.* The corporation has the power to release its claims whether asserted in the complaint or not. Although there are other considerations that require a court to scrutinize carefully the scope of the releases, the court may be confident that the parties have the power to make them.

National Super Spuds, 660 F.2d at 18-19 (emphasis added).

judicial approval of the release and entry of a judgment. *National Super Spuds*, 660 F.2d at 18 (quoting Haudek, *The Settlement and Dismissal of Stockholders' Action — Part II: The Settlement*, 23 Sw.L.J. 765, 773 (1969)). Because class actions do not require the active participation of class members, class settlements pose a danger not present in traditional litigation: that representative plaintiffs and their lawyers will "endeavor to obtain a better settlement by sacrificing the claims of others at no cost to themselves." *Id.* at 19. For this reason, "a court may not delegate to [class] counsel the performance of its [own] duty to protect the interests of absent class members." *Plummer v. Chemical Bank*, 668 F.2d 654, 659 n.4 (2d Cir. 1982). Instead, in order to protect the rights of absent class members, the court must assume a far more active role than it typically plays in traditional litigation. A class action, thus, is less an individual lawsuit than "a quasi-administrative proceeding, conducted by the judge." *Shutts v. Phillips Petroleum Co.*, 472 U.S. 797, 809 (1985).

This notwithstanding, Matsushita argues that the failure of the Epstein plaintiffs to opt out of the class is sufficient reason to bind them contractually to the release of their federal claims. In Matsushita's view, the opportunity to opt out changes the essence of a class action settlement from an exercise of judicial power restrained by jurisdictional limits into an exercise of individual consent. This argument fails for two reasons. First, that the class members have a right to opt out does not diminish the extent to which a class action settlement is an exercise of judicial power. Regardless of whether class members are given opt-out rights, the court is still required to ensure that representation is adequate and that the settlement is fair to class members. *See, e.g., Prezant v. Salton/Maxim Houseware, Inc.*, 636 A.2d 915 (Del. 1994). The settlement of the class action is not an act of judicial mediation; it is an act of judicial power. Second, the "consent" purportedly given by class members in deciding *not* to opt out is hardly comparable to the consent given by individual plaintiffs in deciding to settle their own traditional lawsuits. Because opt-out rights are, as the Delaware Supreme Court has observed, "infrequently utilized and usually economically impracticable," *Prezant*, 636 A.2d at 924, we would be blind to reality to think that

any consent implied by class members in deciding not to opt out is comparable to the consent given by individual plaintiffs in settling their own lawsuits.

In sum, we reject Matsushita's effort to equate class settlements with settlements of individual lawsuits. We believe that a state court cannot require passive class members to contractually release their exclusively federal claims in order to enjoy the benefits of a state class action, when the court has no jurisdictional power to dispose of those claims either directly or indirectly through the doctrine of issue preclusion.[33]

D. Conclusion

We respectfully decline to give full faith and credit to the Delaware judgment to the extent that it releases exclusively federal claims that depend upon different underlying facts than the state claims depend upon. [34] Accordingly, we hold that the Delaware judgment does not preclude the Epstein class action.

V. Class Certification

We now turn to the question whether the district court abused its discretion in denying the Epstein plaintiffs' motion for class certification. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1304 (9th Cir. 1990) (class certification rulings reviewed for abuse of discretion). The district court gave no explanation for its ruling.

This case fits the requirements of both Rule 23(a) and Rule 23(b)(3) like a glove. The questions of Matsushita's liability are

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[33] Whether the release of federal securities claims in this case is a valid contract defense to the Epstein class action is a question of federal law. *See, e.g., Newton v. Rumery*, 480 U.S. 386, 392 (1987). A contract releasing federal statutory rights need not be enforced by a federal court if "the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.*

[34] Again, we do not decide whether a state court may release exclusively federal claims in a class action settlement judgment when those claims depend on the same facts as state law claims before the court.

the same for each of the 7,000 shareholders who tendered their MCA shares: (1) Did Matsushita violate section 14d-10 in acquiring Wasserman's shares on terms that were different from the terms of the tender offer, and (2) Did Matsushita violate section 14d-10 in authorizing the post-tender offer payment of $21 million to Sheinberg? The claims of every tendering shareholder turn on identical facts and law—regardless of the identity or circumstances of the particular shareholder.

Under these circumstances, a class action would plainly be "superior to other available methods for the fair and efficient adjudication of the controversy," because the "interest of members of the class in individually controlling the prosecution ... of separate actions," is minimal, while the "desirability ... of concentrating the litigation of claims in the particular forum," is compelling. Fed.R.Civ.P. 23(b)(3). Indeed, it is difficult to imagine a case where class certification would be more appropriate. Without it, thousands of identical complaints by former MCA shareholders would have to be filed—the very result the class action mechanism was designed to avoid.

Matsushita argues nonetheless that the claims of each MCA shareholder do not have enough in common to justify class certification because an "indispensable element of each plaintiff's claim is that he or she would have elected to take the preferred stock [given to Wasserman] if it was offered." Brief of Matsushita at 52. Matsushita also argues that each individual shareholder's per share damages will vary because whether "the preferred stock" that Wasserman received "could have constituted 'higher' consideration" than the cash all other shareholders received "would depend on the individual [tax] circumstances of each plaintiff." *Id.* "Each plaintiff," it claims, "would be subject to cross examination on these issues." *Id.*

These arguments are meritless. In the first place, Matsushita cites neither law nor logic for the proposition that each shareholder is required to prove as an element of a Rule 14d-10 violation that she would have elected to take the preferred stock given to Wasserman had she been offered it. All a shareholder needs to prove to recover damages as a result of the Wasserman

transaction is that she was not offered the consideration provided to Wasserman, and that the consideration Wasserman received was worth more than the consideration she received. Since it is undisputed that each shareholder (save Wasserman and perhaps Sheinberg) received $66 in cash and $5 worth of stock in WWOR-TV, each shareholder's per share damages would be measured by the same yardstick: the extent to which the value of the preferred stock Wasserman received for each of his shares was greater than the $66 cash per share other shareholders received.[35] The tax situation of each shareholder has nothing to do with it. Furthermore, "the amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

In arguing against class certification, Matsushita mentions only the Wasserman transaction. It says nothing about why a class should not be certified to litigate the claim that Matsushita made the $21 million payment to Sheinberg. If plaintiffs prevail on their claim that Matsushita violated Rule 14d-10 by paying Sheinberg a premium of $21 million for his 1,179,635 shares, the damages of each tendering shareholder would simply be $17.80 per share.

Finally, Matsushita argues that the named plaintiffs are unsuitable to serve as class representatives, citing the district court's finding that plaintiff Lawrence Epstein prosecuted this action under "false pretenses" because he "deliberately concealed" from the court that he held his MCA stock in a tax-free IRA account. This finding, however, was first proposed by Matsushita in a motion filed well after the district court denied class certification, which means that it could not have informed in any way the district court's denial of the Epstein plaintiffs' motion. Moreover, we fail to see why the fact that Epstein held his shares in an IRA account should disqualify him from serving as a named plaintiff in this case. A shareholder's individual tax circumstances, as we have stated, has no relevance to whether

[35] Recall that Wasserman also received for each of his shares the $5 worth of stock in WWOR-TV.

Matsushita violated Rule 14d-10 or how much in damages it would owe tendering MCA shareholders if it did.[36]

The record shows that the performance of the Epstein plaintiffs and their counsel in pursuing this litigation has been exemplary. We see no reason why they should not represent the class of MCA shareholders who tendered their shares. The district court's order denying class certification is vacated, and the district court is instructed on remand to enter an order certifying the class.

VI. The Motion to Amend the Complaint

The Epstein plaintiffs argue that the district court abused its discretion in denying their motion to amend their complaint to allege that the tender offer documents released to shareholders were false and misleading, in violation of section 14(e) of the Williams Act.[37] The district court failed to explain why it denied the motion. "In the absence of some statement of reasons or findings of fact showing bad faith or prejudice, we cannot [on the record before us] determine whether it was an abuse of discretion to deny" the motion for leave to amend the complaint. *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981). Accordingly, we vacate the district court's order denying the motion for leave to amend and remand to the district court for reconsideration of the motion.

[36] In addition, the record lends no support to the notion that Epstein misbehaved in pursuing this litigation. The district court's finding that he prosecuted this action under false pretenses is clearly erroneous. There is no evidence that Epstein intentionally hid the fact that he kept his shares in an IRA account. Matsushita deposed Epstein twice, but failed to ask him how he held his MCA shares. Further, prior to his second deposition, Epstein produced transaction slips which indicated that he held his MCA shares in an IRA account.

[37] Plaintiff Walter Minton argues on appeal that the district court abused its discretion in denying his motion to amend his complaint to add a section 14(d)(7) claim. Because there is no material difference between a section 14(d)(7) and a Rule 14d-10 claim, the question whether the district court abused its discretion in denying Minton's motion for leave to amend is moot.

VII. Conclusion

1. The district court's order denying plaintiffs' motion for partial summary judgment against Matsushita on the Wasserman claim is reversed, and the district court is instructed to grant such motion.

2. The district court's order granting Matsushita's motion for summary judgment is vacated.

3. The district court's order dismissing plaintiffs' claims against MCA, Wasserman, and Sheinberg for aiding and abetting is affirmed.

4. The district court's orders denying the Epstein plaintiffs' motions for class certification and for leave to amend their complaint are vacated and remanded.

Appendix B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE EPSTEIN, et al., *Plaintiffs,* *v.* MCA INC., et al., *Defendants.*	CASE NO. CV 90-6451-R CASE NO. CV 91-0336 R (Consolidated Cases) SECOND AMENDED ORDER AND FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING MATSUSHITA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING THE CONSOLIDATED ACTIONS
WALTER MINTON, *Plaintiff,* *v.* MCA INC., et al., *Defendants.*	

The motion of defendants Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corp. and Matsushita Acquisition Corp. (the "Matsushita Defendants") for summary judgment dismissing the *Epstein* plaintiffs' Consolidated Amended Complaint and the complaint filed by plaintiff Walter Minton came on for hearing on Monday, February 10, 1992 at 10:00 a.m. in Courtroom 8 of the above-entitled Court before the Honorable Manuel L. Real.[38]

After full consideration of the evidence, the points and authorities and declarations submitted by the parties, and the

[38] This Second Amended Proposed Order and Findings of Fact and Conclusions of Law is filed by leave of this Court granted March 3, 1992, upon Matsushita's application to supplement the record to reflect the recently-discovered fact that the MCA stock owned by lead plaintiff Lawrence Epstein was held in a tax-free retirement account.

oral argument of counsel, and upon all prior proceedings held herein, including the Court's Order of August 13, 1991 dismissing all claims in this action brought under SEC Rule 10b-13, and all claims against defendants MCA Inc. ("MCA"), Lew R. Wasserman and Sidney J. Sheinberg, the Court finds that the Matsushita Defendants are entitled to summary judgment dismissing with prejudice the *Epstein* plaintiffs' Consolidated Amended Complaint and the complaint filed by plaintiff Minton as a matter of law.

I. UNCONTROVERTED FACTS

The Court finds that there is no genuine issue as to the following material facts:

1. Defendant Matsushita Holding Corp. is a Delaware corporation formed by Defendant Matsushita Electric Industrial Co., Ltd., a Japanese corporation, for the purpose of making a tender offer for the common stock of MCA. *See* Pre-Trial Conference Order, filed January 27, 1992, Stipulated Fact No. 2.

2. MCA is a Delaware corporation having its principal place of business in Los Angeles, California. *See* Stipulated Fact No. 3.

3. At all relevant times, Lew R. Wasserman has been the Chairman of the Board of Directors and Chief Executive Officer of MCA. As of November 26, 1990, Mr. Wasserman directly owned approximately 4,953,927 shares of MCA common stock. Mr. Wasserman's basis in that stock was approximately 3 cents per share. As of September 1990, Mr. Wasserman was 77 years of age. *See* Stipulated Fact No. 4.

4. Sidney J. Sheinberg is President and Chief Operating Officer of MCA. Immediately prior to the tender offer, Mr. Sheinberg owned approximately 1,179,635 shares of MCA common stock. *See* Stipulated Fact No. 5.

5. The several complaints filed by plaintiffs Lawrence Epstein, John Linder, Ruth Karlin, Maurice Karlin, Beth Ann

Karlin, Bert P. Karlin and Jane Rockford (the "*Epstein plaintiffs*"), the first of which was filed on December 3, 1990, were consolidated in a consolidated amended complaint dated April 22, 1991 (the "Epstein action"). The *Epstein* action was consolidated with the complaint filed by plaintiff Walter Minton on January 17, 1991, by Order of the Court dated April 23, 1991. Each of these complaints alleged identical claims under Securities and Exchange Commission ("SEC") Rule 10b-13 and Rule 14d-10(a)(2), and no other provision of law.

6. As a result of the Court's prior rulings denying class certification on April 1, 1991 and September 3, 1991, the *Epstein* plaintiffs maintain this action individually, in their own right only.

7. By Order dated August 13, 1991, the Court dismissed with prejudice plaintiffs' claims under SEC Rule 10b-13 on the ground that there is no implied private right of action under that provision, and dismissed with prejudice all claims asserted against MCA and Messrs. Wasserman and Sheinberg for failure to state a claim upon which relief can be granted.

8. On December 9, 1991, after full briefing and a hearing, the Court enjoined plaintiffs and their counsel from (1) commencing litigation arising out of the MCA acquisition against any entity and (2) amending the pleadings in any previously-filed actions relating to the MCA acquisition to add new parties without prior leave of this Court.

9. On January 13, 1992, the Court granted the motion of plaintiffs Maurice Karlin, Ruth Karlin, Beth Ann Karlin and Bert Karlin (the "Karlins") for voluntary dismissal with prejudice from this action. The Court did not dismiss the Karlins from Matsushita's then pending motion for contempt and sanctions for the *Epstein* plaintiffs' failure to comply with the Court's November 4, 1991 order compelling discovery.

10. On January 27, 1992, after full briefing and a hearing, the Court found each of the *Epstein* plaintiffs and their counsel, Roger Kirby of Kaufman, Malchman, Kaufmann & Kirby, in

contempt of Court for their continued failure to provide Matsushita with all discovery ordered to be produced in the Court's Order of November 4, 1991, and awarded sanctions to Matsushita, in an amount yet to be calculated.

11. On March 3, 1992, upon Matsushita's application to supplement the record, the Court found that lead plaintiff and purported class representative Lawrence Epstein prosecuted this action for 15 months under false pretenses. Throughout this litigation, the *Epstein* plaintiffs deliberately concealed the fact that the MCA stock owned by Mr. Epstein was held in a tax-free IRA account. In depositions, Mr. Epstein testified under oath that he initiated this action because Mr. Wasserman was disposing of his MCA stock in a "tax free" transaction and Mr. Epstein was not. Mr. Epstein also testified that he anticipated paying capital gains taxes as a result of his profit on the tender of his MCA stock. In fact, Mr. Esptein knew he would not pay capital gains tax as a result of Matsushita's Tender Offer for MCA because his MCA stock, and his Tender Offer proceeds, were held in a tax-free retirement account. *See* Prudential-Bache Retirement Account Statements, attached as Exhibit C to Declaration of Barry R. Ostrager, sworn to on February 27, 1992, and filed in support of Matsushita Defendants' *Ex Parte* Application to Supplement the Record. This fact demonstrates that Mr. Epstein did not and could not have sustained any injury as a result of the Tender Offer, and, if known, would have disqualified him as a plaintiff in this action.

A. The Contribution Agreement

12. For business reasons, it was important to Matsushita to maintain continuity in the management of MCA if Matsushita acquired MCA in the Tender Offer.

13. Prior to 9:30 a.m. on November 26, 1990, Matsushita and MCA entered into an Agreement and Plan of Merger (the "Merger Agreement"), which provided that Matsushita would make a cash tender offer for the outstanding shares of MCA (the "Tender Offer") and that thereafter Matsushita Acquisition Corp. would merge with and into MCA.

14. Prior to 9:30 a.m. on November 26, 1990, Matsushita and Lew R. Wasserman entered into the Capital Contribution and Loan Agreement ("Contribution Agreement"), whereby Mr. Wasserman committed to exchange his MCA common stock for preferred stock in Matsushita Holding Corp. after the expiration of the Tender Offer, in a capital contribution transaction involving the issuance of shares in a new parent company of MCA, a transaction that was different from the Tender Offer in form and purpose. *See* Stipulated Fact No. 17.

15. Subsequently, at 9:42 a.m., e.s.t. on November 26, 1990, the Tender Offer was publicly announced. See Declaration of Gerald Sauer, sworn to on October 14, 1991, Exhibit C.

16. SEC Rule 14d-10 regulates certain conduct by a tender offeror during the tender offer period. *See* 17 C.F.R. § 240.14d-10 (1991). The tender offer period expires when shares may no longer be tendered for acceptance pursuant to the tender offer. *See, e.g.*, 17 C.F.R. § 240.10b-13 (1991).

17. Pursuant to the terms of the Offer to Purchase, the Tender Offer expired—that is, shares could no longer be tendered for acceptance pursuant to the Tender Offer—at 12:01 a.m. on December 29, 1990. *See* Offer to Purchase, at cover page, p.5; Complaint, ¶ 32.

18. The Offer to Purchase bound Matsushita to accept the tendered shares for payment if more than 50 percent of the outstanding shares of MCA were validly tendered. *See* Offer to Purchase, at 1.

19. Immediately after 12:01 a.m. on December 29, 1990, attorneys for Matsushita telephoned the depositary for the Tender Offer (Citibank, N.A.), to ascertain whether more than 50 percent of the shares had been validly tendered. *See* Stipulated Fact No. 19.

20. The depositary informed Matsushita that ninety-one percent of all MCA shares had been tendered and not withdrawn by that time. *See* Stipulated Fact No. 19; Declaration of John G. Finley, dated February 25, 1991 ("Finley Decl."), attached as

Exhibit C to the Declaration of Gerald Sauer, dated January 17, 1992, filed in support of Matsushita's motion for summary judgment ("Sauer Decl."). At this point shares could no longer be tendered for acceptance, and the Tender Offer period expired.

21. At 12:05 a.m. on December 29, 1990, Matsushita accepted the tendered shares for payment by telecopying a notice of acceptance for payment to the depositary. *See* Stipulated Fact No. 21; Notice of Acceptance, attached as Exhibit D to the Sauer Decl.

22. The Contribution Agreement was consummated at 1:25 a.m. on December 29, 1990, when Mr. Wasserman exchanged his MCA common stock certificates for preferred stock certificates in Matsushita Holding Corp. *See* Stipulated Fact No. 21; Cross Receipt, attached as Exhibit E to the Sauer Decl.; Finley Decl., ¶ 3.

23. The value of the preferred stock received by Mr. Wasserman in exchange for his MCA common stock was no greater than the $66 in cash paid pursuant to the Tender Offer. At best the basis of the Wasserman MCA stock would be transferred to the stock of Matsushita received by Wasserman under § 368(a)(1)(b) of the Internal Revenue Code.

24. Plaintiffs Epstein, Linder and Rockford have represented to the Court that they would not have elected to receive the preferred stock in lieu of $66 in cash, even if Matsushita had offered preferred stock as an alternative form of consideration in the Tender Offer. *See* Transcript of hearing dated December 16, 1991 at 10; Plaintiffs' Supplemental Memorandum in Opposition to Matsushita's Motion to Compel dated October 29, 1991 at 2.

25. Plaintiff Epstein received the cash Tender offer proceeds tax-free and was able to invest them as he chose.

B. The Sheinberg Employment Contract

26. Under Mr. Sheinberg's employment agreement with MCA prior to the Tender Offer, Mr. Sheinberg had the right to terminate his employment whenever MCA was acquired by any

entity, and to continue for the remaining years of his employment contract to receive his salary of $8 million per year.

27. On December 31, 1990, MCA paid Mr. Sheinberg $21 million in consideration for his Amended Employment Agreement, (the "Sheinberg Employment Contract") whereby he agreed to continue his employment with MCA for a set term and to relinquish certain rights under his prior employment contract, including his right to collect salary without performing future services. *See* Sheinberg Employment Contract, attached as Exhibit F to the Sauer Decl.; Stipulated Fact No. 18; Declaration of Theodore N. Mirvis, dated October 11, 1991 ("Mirvis Decl.") and attached as Exhibit G to the Sauer Decl.

28. The $21 million payment was also made to compensate Mr. Sheinberg for the loss of a stock option bonus for 1 million shares of MCA promised to him by MCA prior to the Tender Offer, and which he would have received but for the Tender Offer. *See* Offer to Purchase, at 25-26; Deposition of Lew Wasserman dated June 12, 1991, at 75.

29. The $21 million payment was made by MCA, not Matsushita. *See* Pretrial Order Stipulated Fact No. 18; Mirvis Decl. ¶ 2, attached as Exhibit G to the Sauer Decl.

30. On January 3, 1991, MCA shareholders who had tendered their shares into the Tender Offer were paid $66 in cash per share, plus a stock representing an interest in WWOR-TV, which MCA spun off to its shareholders. A short-form merger was also completed on January 3, 1991.

II. CONCLUSIONS OF LAW

31. By order dated August 13, 1991, the Court dismissed with prejudice all claims brought under SEC Rule 10b-13 on the ground that no private right of action exists under that provision. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530 (9th Cir. 1984). The Court also dismissed in that Order all claims alleged against defendants MCA and Messrs. Wasserman and Sheinberg for failure to state a claim upon which relief can be granted.

A. AS A MATTER OF LAW, THE CAPITAL CONTRIBUTION AGREEMENT DID NOT VIOLATE RULE 14D-10

32. Rule 14d-10 is a mechanical provision regulating certain payments to shareholders of a target corporation *during* the tender offer period. *See* 17 C.F.R. 240.14d-10 (1986).[52] By its own terms, Rule 14d-10 proscribes only payments made to shareholders during the tender offer period. Rule 14d-10 does not purport to regulate payments to shareholders either prior to the commencement of the tender offer period or after the tender offer period expires.

33. The SEC itself and all relevant case law make clear that the tender offer rules do not apply to private transactions before or after the tender offer period. See SEC Exchange Act Release No. 8712 [1969-70 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,745, at 83,709 (Oct. 8, 1969); *see also Priddy v. Edelman*, 679 F. Supp. 1425, 1432 (E.D. Mich. 1988), *aff'd*, 883 F.2d 438 (6th Cir. 1989); *Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893, 900 n.12 (D. Del. 1984).

34. Injury and damages are essential elements of plaintiffs' claims. The sole theory of injury or damages advanced by plaintiffs was a demand for an additional cash payment equal to the tax Mr. Wasserman would have paid if he had received $66 in cash for his MCA shares rather than continuing as a shareholder in the new parent company of MCA. This theory cannot support a finding of injury or damages.

35. Mr. Wasserman and each of the plaintiffs has his or her own unique tax situation and the transactions at issue had unique tax consequences for each MCA shareholder. For example, plaintiff Epstein's shares are held in a tax-free Individual Retirement account. Wasserman's tax-basis would be transferred pursuant to § 368(A)(1)(b) of the Internal Revenue Code.

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[52] Rule 14d-10 provides, in relevant part, as follows: "(a) No bidder shall make a tender offer unless . . . (2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder *during such tender offer*." 17 C.F.R. 240.14d-10 (1991) (emphasis added).

36. Therefore, plaintiffs cannot prove a violation of Rule 14d-10 without establishing each of the following insupportable propositions: (a) that Mr. Wasserman was paid *during* the tender offer period; (b) assuming Mr. Wasserman was paid during the tender offer period, that he received *higher* consideration than the other MCA shareholders received pursuant to the Tender Offer; and (c) assuming the above two elements are established, that plaintiffs were damaged by not having the option to receive the preferred stock. *See Priddy*, 679 F. Supp. at 1431-32; *see also Kahn v. Virginia Retirement System*, F. Supp. , 1992 WL 8939 (E.D. Va. Jan. 23, 1992). Plaintiffs have established none of these requirements.[53]

1. The Capital Contribution Agreement Was Entered Into Before the Tender Offer Commenced

37. For the purposes of Rule 14d-10, the commencement of the tender offer period is defined by Rule 14d-2. Rule 14d-2 provides that the initial public announcement shall be "deemed" to be the commencement of the tender offer unless, *within five business days of such an announcement*, the bidder publishes the disclosures required by Rule 14d-6 and Rule 14d-4, namely the Schedule 14D-1. See Rule 14d-2(b)(2). If the bidder publishes and files its Schedule 14D-1 in accordance with Rules 14d-6 and 14d-4, then the date of commencement of the tender offer is the date of the filing of the Schedule 14D-1 (not the date of the initial public announcement). *See* Rule 14d-2(b)(i).

38. The parties have stipulated that Matsushita published and filed its Schedule 14D-1 on November 30, 1990. Pretrial order, dated January 21, 1992, Stipulated Fact No. 16. Accordingly, under Rule 14d-10, November 30 is the date of the commencement of the Tender Offer period.

39. As the Contribution Agreement was entered into on November 26th, the Contribution Agreement was entered into

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[53] In addition to the foregoing, to establish a violation of Rule 14d-10, plaintiffs must demonstrate that the Matsushita defendants acted with scienter. *Cf. Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 539 (9th Cir. 1984). Plaintiffs proffered no evidence touching this element of their case.

prior to the November 30 commencement of the Tender Offer period.

2. *The Capital Contribution Agreement Was Consummated After The Tender Offer Period Expired*

40. For the purposes of the Williams Act and the SEC Rules promulgated thereunder, the tender offer period expires when shares may no longer be tendered for acceptance pursuant to the tender offer. *See, e.g.*, 17 C.F.R. § 240.10b-13 (1991) (tender offer rules are inoperative after expiration of the period when "securities tendered pursuant to such offer may by the terms of the offer be accepted or rejected"); *Kahn v. Virginia Retirement System,* F. Supp. , 1992 WL 8939 (E.D. Va. Jan. 23, 1992) (no violation of Rule 14d-10 where the challenged transactions were contracted for prior to the commencement of the tender offer period and consummated after the acceptance for payment of tendered shares); *Kramer v. Time-Warner, Inc.*, [1990-91 Transfer Binder] (CCH) ¶ 95,619, at 97,902 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 767 (2d Cir. 1991) (equivalent tender offer period for Rules 10b-13 and 14d-10).[54]

41. A time-stamped cross-receipt proves (and plaintiffs offered no evidence to contradict the fact) that the Contribution Agreement was consummated at 1:25 a.m., on December 29, 1990 when Mr. Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding Corp. *See* Cross Receipt, attached as Exhibit E to the accompanying Sauer Decl.; Finley Decl., at ¶ 3. As a matter of law, this payment was made after the Tender Offer expired.[55]

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[54] Throughout this litigation plaintiffs have relied upon a single case, *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), which plaintiffs misread. Among other differences, the violative payment in *Field* was arguably made during the tender offer period. Field, 850 F.2d at 942-43.

[55] As provided by the Contribution Agreement, the consummation of the Wasserman transaction could only occur following "the time at which shares of MCA Common Stock are accepted for payment pursuant to and in accordance with the terms of the Offer." *See* Stipulated Fact No. 8; Contribution Agreement, § 2(a) (emphasis added).

42. These facts conclusively establish that the contribution Agreement did not violate Rule 14d-10.

43. No case has ever held that a tender offer extends past the last date upon which shares can be tendered in order to encompass a private transaction that was consummated thereafter. Instead, case law unanimously concludes that the tender offer Rules do not preclude private sales of stock so long as the technical terms of the Rules are obeyed. *See, e.g., Hanson Trust PLC v. SCM Corp.*, 774 F. 2d 47, 60 (2d Cir. 1985) (if tender offer not currently pending, "neither the [Williams] Act nor any SEC Rule promulgated thereunder prohibits" the purchase of "stock of a target company through privately negotiated transactions"); *Kramer*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,619, at 97,902 (no Rule 14d-10 violation when compensation agreement entered into on same day as tender offer announced and consummated after the close of the tender offer period); *Priddy*, 679 F. Supp. at 1432 (when major shareholder bought out at higher price after original tender offer withdrawn and before successive tender offer commenced, such purchase not made "during or pursuant to any tender offer whatsoever"; if tender offer not pending, offeror may "purchase shares upon whatever other terms may be negotiated, free of the constraints of [Rule 14d-10]"); *Brill*, 590 F. Supp. at 900 n.12 (pre-tender offer purchases should not be integrated with purchases made pursuant to tender offer) (collecting cases).

44. Indeed, extension of the tender offer Rules to privately negotiated purchases consummated outside the tender offer period "would likely have a disruptive effect upon private . . . transactions which was never intended [by Congress]." *Nachman Corp. v. Halfred, Inc.*, [1973-74 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,455, at 95,593 (N.D. Ill. 1973).

3. *The Merger Agreement and Contribution Agreement are Separate Agreements Entailing Independent Obligations Owed to Different Parties*

45. Plaintiffs have argued (with no evidentiary support) that the Contribution Agreement was somehow made "pursuant to" the Tender Offer or that it is "intertwined" with the Tender

Offer.[56] For all purposes relevant to Rule 14d-10, the Contribution Agreement and Merger Agreement are separate and independent.

46. It is clear from the operative terms of the two Agreements that they each create independently enforceable obligations. Matsushita was legally obligated to consummate the Tender Offer without regard for the Contribution Agreement. *See* Offer to Purchase, § 2, p. 6; *see also Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir. 1975). Under the Merger Agreement, as long as more than 50 percent of the outstanding shares were tendered and the other conditions of the Tender Offer (none of which related to Mr. Wasserman) were satisfied, Matsushita was fully obligated to pay for all shares tendered regardless of whether Mr. Wasserman's shares were purchased pursuant to the Contribution Agreement. *See* Merger Agreement, at Article 8; Declaration of Kaoru Takada, dated December 26, 1990 and filed with the Court on December 27, 1990, at ¶¶ 3-7.

47. Moreover, the Contribution Agreement became binding on Mr. Wasserman *before* the Tender Offer was announced. Matsushita in fact conditioned the making of the Tender Offer on Mr. Wasserman's separately negotiated, prior commitment set forth in the Contribution Agreement to exchange his MCA shares for shares in Matsushita Holding Corp. after the expiration of the Tender Offer. *See* Declaration of Lew R. Wasserman dated December 26, 1990. Thus, Mr. Wasserman alone relinquished the right of every other MCA shareholder to sell into the market during the Tender Offer period.

[56] These arguments are irrelevant in any event. Under Rule 14d-10, unless the separate transaction in question occurs *during the tender offer period*, the Rule does not regulate it. *See Kahn, supra*. Therefore, the fact that a transaction may be related to a tender offer in certain respects is immaterial to the operation of Rule 14d-10 if the separate transaction is neither entered into nor consummated during the Tender Offer period. *See* 17 C.F.R. § 240.14d-10.

4. No Case Law Supports Plaintiffs' Position that the Capital Contribution Agreement and the Tender Offer Should be Integrated

48. Plaintiffs invite the Court to ignore the language of Rule 14d-10 and the realities of the transactions at issue to fuse two separate transactions into a single tender offer transaction. Plaintiffs' argument is entirely inconsistent with relevant case law. Throughout this litigation plaintiffs have relied upon a single case, which (as this Court has observed) plaintiffs misread. In *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), the Second Circuit held that there was a material issue of fact precluding a motion to dismiss on the issue of whether two public tender offers should be integrated as one when the offeror "withdrew" the initial public tender offer for a period of a few hours to consummate a private transaction at a higher price and then commenced a purported "second" tender offer. These facts are clearly distinguishable from this case and concern an issue that does not exist here.

49. Plaintiffs misapply *Field* to argue that the Court should expand the scope of a *single* uninterrupted public tender offer to integrate a private transaction that was entered into and consummated outside the public tender offer period. *Field* does not support the integration of private transactions that precede or follow a public tender offer, and it has never been so construed. *See, e.g., Kramer v. Time Warner*, [1990-91 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,619 (S.D.N.Y. Oct. 24, 1990) (finding *Field* "easily distinguishable") *aff'd*, 937 F.2d 767 (2d Cir. 1991). The tender offer Rules are technical prohibitions which must be strictly interpreted "for the accurate guidance of those engaged in the complexity of negotiations for corporate control." *See Feder v. MacFadden Holdings, Inc.*, 722 F. Supp. 68, 70 (S.D.N.Y. 1989).[57]

[57] Courts have consistently recognized that parties attempting to structure transactions in compliance with the federal securities laws need guidance and certainty. *See, e.g., Pinter v. Dahl*, 486 U.S. 622, 652 (1988); *City Capital Assoc. Ltd. Partnership v. Interco, Inc.*, 860 F.2d 60, 64 (3d Cir. 1988) (federal securities laws, and Williams Act in particular, are "an area of the law in which predictability is of crucial importance"). Similarly, the

50. Rule 14d-10 applies only to "actions taken during tender offers," and is inapplicable to payments (like the payment under the Contribution Agreement here) made after the expiration of the Tender Offer period. *Kramer v. Time Warner, supra*, ¶ 95,619 at 97,902-903. In *Kramer*, the Court held that no violation of Rule 14d-10 occurred when a compensation agreement, entered into on the same day as the tender offer was announced, permitted management to receive a higher price per share after the tender offer period. The *Kramer* court found that "[t]his is simply not a case, like *Field*, in which a defendant has attempted artificially to bifurcate a single transaction in order to evade the tender offer rules." *Id.* at 97,903; *see also Feder*, 722 F. Supp. at 69 (court refuses to integrate two separate tender offers and a private purchase, limiting the application of *Field* to purported withdrawals of tender offers). There is no case to the contrary.

5. Plaintiffs Sustained No Damages

51. Mr. Wasserman did not receive a tax-free deal as plaintiffs contend. Rather, by operation of the Internal Revenue Code, Mr. Wasserman's tax basis in his MCA common stock was transferred to the preferred stock in Matsushita Holding Corp. he received under the Contribution Agreement, in a transaction in which no gain or loss was recognized. Mr. Wasserman received only a transfer of tax basis and not any tax benefit. Mr. Wasserman will pay tax on the preferred stock when it is redeemed.

52. None of the plaintiffs has sustained any legally-cognizable injury by virtue of not being offered the preferred stock. For

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Ninth Circuit rejected a definition of tender offer under Rule 13e-4 and 13e-1 that was "vague and difficult to apply" and "offer[ed] little guidance to the issuer as to when his conduct will come within the ambit" of the relevant rules. *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 953 (9th Cir. 1985). Plaintiffs' approach is "largely subjective and made in hindsight based on an *ex post facto* evaluation" of the facts of a particular case and therefore must be rejected. *Id.* As the Supreme Court and other federal courts have done, this Court rejects plaintiffs' invitation to "inject uncertainty into the tender offer process." *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985).

example, plaintiff Epstein received the *cash* Tender Offer proceeds tax-free, and was able to invest those proceeds as he chose. In addition, the *Epstein* plaintiffs stipulated that they would not have elected to receive the preferred stock received by Mr. Wasserman. Thus, Matsushita is entitled to summary judgment since plaintiffs cannot prove damages, an essential element of their claim.

B. THE SHEINBERG EMPLOYMENT CONTRACT DID NOT VIOLATE RULE 14D-10

53. Uncontested documentary evidence establishes that the $21 million Employment Contract payment was made to Mr. Sheinberg on December 31, 1990, two days after the expiration of the Tender Offer period. *See* Stipulated Fact No. 18; Mirvis Decl., ¶ 2. The signed and dated checks by which Mr. Sheinberg was paid were produced to plaintiffs on June 19, 1991.

54. Mr. Sheinberg's Employment Contract payment was made by MCA, not Matsushita. It is well settled that payments made by the target, as opposed to the bidder cannot constitute a Rule 14d-10 violation. *See* Kramer 937 F.2d at 779; *Brill* 590 F. Supp. at 900.

55. Moreover it is well settled that employment related payments are separate and distinct from tender offer payments. *See Brill*, 590 F. Supp. at 900-901.

III. CONCLUSION

56. Because plaintiffs have not and cannot "set forth specific facts showing that there is a genuine issue for trial," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), summary judgment is appropriate for defendants on all claims asserted under Rule 14d-10. The Court has previously dismissed with prejudice plaintiffs' claims under Rule 10b-13 and all claims asserted against MCA and Messrs. Wasserman and Sheinberg. Therefore, the Court shall enter final judgment dismissing both complaints with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion for summary judgment dismissing the *Epstein* plaintiffs' Consolidated Amended Complaint and the complaint filed by plaintiff Walter Minton is hereby granted with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Order of this Court dated December 9, 1991, the above-mentioned plaintiffs and their respective counsel, and all persons in active concert or participation with any or all of them, and all persons having actual notice hereof, are hereby permanently restrained from commencing any judicial or administrative proceeding in any forum involving, or that would involve, directly or indirectly, by way of claims, defenses or counterclaims, any claims that arise out of the same transactions or occurrences as the claims in these actions, between these parties and from amending the pleadings to add new parties in any pending action between these parties arising out of Matsushita's acquisition of MCA, without first seeking and obtaining leave of this Court upon proper notice to the Matsushita defendants through their counsel in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction over these actions: (a) to enforce the above-described permanent injunction; (b) to enforce the order of January 27, 1992 finding the *Epstein* plaintiffs and their counsel in contempt of Court and to award costs and attorneys' fees and sanctions to Matsushita by reason

of the *Epstein* plaintiffs' contempt and (c) to award Matsushita its costs in this action as provided by Local Rule 16.

Dated: April 15, 1992

/s/ HON. MANUEL L. REAL
HON. MANUEL L. REAL
Chief Judge of the United
States District Court

Submitted by:

SIMPSON THACHER & BARTLETT
(a partnership which includes
professional corporations)

By: /s/ MARY KAY VYSKOCIL
Mary Kay Vyskocil

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER MINTON,

Plaintiff—Appellant,

v.

MCA INC., MATSUSHITA ACQUISITION CORPORATION, MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORPORATION, LEW WASSERMAN, SIDNEY J. SHEINBERG,

Defendants—Appellees

No. 92-55632

ORDER

LAWRENCE EPSTEIN, JOHN LINDER; JANE ROCKFORD, as trustee of the Michael J. Rockford Trust; MAURICE KARLIN; RUTH KARLIN; BETH ANN KARLIN; BERT P. KARLIN,

Plaintiffs—Appellants,

v.

MCA INC.; MATSUSHITA ACQUISITION CORPORATION; MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; MATSUSHITA HOLDING CORPORATION; LEW WASSERMAN; SIDNEY J. SHEINBERG,

Defendants—Appellees.

No. 92-55675

Before: NORRIS, WIGGINS, O'SCANNLAIN, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Wiggins and O'Scannlain have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

File stamped April 6, 1995 by Cathy A. Catterson, Clerk, U.S. Court of Appeals.

Appendix D

In RE MCA, INC. SHAREHOLDERS LITIGATION.

CIV. A. 11740.

Court of Chancery of Delaware.

Feb. 16, 1993.

MEMORANDUM OPINION

HARTNETT

After considering all the circumstances, the Court in its business judgment approves the settlement of this class action. That has the effect of barring related federal securities law claims that have been filed in federal district court in California. The settlement is approved because the Court finds, on balance, that it is in the best interests of the class to settle this litigation and the terms of the settlement are fair and reasonable—although the value of the benefit to the class is meager.

This decision also awards attorneys' fees to the attorneys for plaintiffs in an amount less than that sought.

I

This is the second time a proposed settlement of this class action has come before this Court. The facts appear in greater detail in this Court's previous opinion in which the initial proposed settlement was rejected. *See, In re MCA, Inc. Shareholders Litigation,* Del. Ch., 598 A.2d 687 (1991).

In September of 1990, Matsushita Electrical Industrial Co., Ltd. ("Matsushita") and MCA, Inc. publicly announced that they were negotiating a possible acquisition of MCA by Matsushita. During the next two days, three purported class action suits were filed against MCA and its directors. Notwithstanding that no acquisition agreement had been reached, the complaints alleged that the defendants had breached their fiduciary duty to

the shareholders by failing to implement a market check procedure to ensure that maximum shareholder value was realized. These actions were consolidated by an order of this Court dated October 2, 1990.

On November 26, 1990, MCA and Matsushita announced that they had entered into a Merger Agreement. Under the Merger Agreement, Matsushita agreed to make a cash tender offer for all of MCA's outstanding shares at $66 per share and agreed to spin off Pinelands, an MCA subsidiary, which controlled a television station which Matsushita, under federal law, was forbidden to acquire.

On December 3, 1990, a purported class action was filed in the United States District Court for the Central District of California as *Epstein v. MCA, Inc. et al.*, No. CV-90-6451-R ("the Epstein action"). The Epstein action alleged that the tender offer included a special deal for the acquisition of the approximately 5 million shares of MCA held by Lew R. Wasserman, MCA's chairman and CEO. Wasserman had agreed with Matsushita to exchange his shares for a special class of preferred stock in a Matsushita subsidiary.

The complaint in the *Epstein* action alleged that this transaction violated SEC Rule l0b-13, 17 C.F.R. 240.10b-13, that prohibits purchases by a tender offeror outside a tender offer during the pendency of the offer and also violated the "all holders, best price" rule in SEC Rule 14d-10, 17 C.F.R. 240.14d-10. Four additional purported class actions alleging similar claims were also filed in the California Federal District Court and were consolidated by Order of the District Court on April 1, 1991.

The plaintiffs in this Delaware action amended their complaint on December 14, 1990 to allege that the tender offer materials failed to disclose the preferential treatment allegedly given to Wasserman. The amended complaint also named Matsushita as a defendant since it allegedly aided and abetted MCA in a breach of fiduciary duty by entering into the transaction with Wasserman. The amended complaint did not allege the breaches of federal securities laws asserted in *Epstein* action, however,

because such claims are within the exclusive jurisdiction of the federal courts.

On December 18, 1990, the parties in this Delaware action filed a Stipulation and Agreement of Compromise and Settlement and this Court provisionally certified the Class pursuant to Chancery Rule 23(b)(2) for settlement purposes only. David and Andrew Minton (purported shareholders of MCA) entered an appearance and objected to the proposed settlement on the sole basis that the settlement, if approved, would release the claims asserted in the Epstein action without affording the members of the class the opportunity to opt out of the class and continue to press the claims in the Epstein action.

This Court held that while the proposed settlement need not provide for an opt-out, it could not be approved. This Court found that the claims asserted in this Delaware action were "at best, extremely weak, and therefore, ha[d] little or no value. It further found that the federal securities law claims in the California action raised issues that had not been definitively addressed by the courts and that those claims therefore clearly had arguable merit and, therefore, some value. *MCA*, 598 A.2d at 695. This Court observed that it must carefully scrutinize any settlement that would have the effect of barring claims of at least arguable merit that were not raised in Delaware litigations but were asserted elsewhere, particularly if a proposed settlement was of little or no value to the class. *Id.*, (citing *Selfe v. Joseph*, Del. Supr., 501 A.2d 409 (1985)).

After this Court evaluated the proposed settlement under this standard, the settlement was rejected as being unfair to the class. *Id.* at 696. While the proposed settlement provided for a generous payment of up to $1 million in attorneys' fees, the only benefit proposed to be received by the class would have been a cosmetic change in a poison pill in Pinelands, a subsidiary of MCA. *Id.* at 695-96. In exchange for this "illusionary" benefit, the class would surrender any potential benefits from the claims in the Epstein action which this Court found to be "the only claims which have any substantial merit ...". *Id.* at 696. Therefore, the proposed settlement was rejected.

On April 1, 1991, the California Federal District Court rejected the plaintiffs' motion for class certification in the *Epstein* action and a second motion for class certification was rejected on September 3, 1991. By Order dated August 13, 1991 the same court dismissed the SEC Rule 10b-13 claim, on the basis that there is no private right of action under that provision. Finally, on February 10, 1992, the Federal District Court granted summary judgment to defendants on the SEC Rule 14d-10 claims on the basis that the Wasserman transaction did not take place within the tender offer period and that Wasserman did not receive a greater consideration than other shareholders. The Epstein plaintiffs have appealed these decisions to the United States Court of Appeals for the Ninth Circuit. On December 17, 1992, that court denied the request of the Epstein plaintiffs to expedite their appeal because of the pendency of the settlement in this Court.

The parties in this Delaware action have now submitted a second settlement proposal. If this proposed settlement is approved, the class will receive $2,000,000 in cash less any award of attorneys' fees. Any class member dissatisfied with the settlement may opt out of the class. This settlement, like the previous proposed settlement, is a "global settlement;" that is, it would bar not just the claims asserted in this Delaware action, but all related claims such as those asserted in the *Epstein* action.

At the settlement hearing, counsel for the plaintiffs in this Delaware action reported that 18 class members had opted out of the class. In addition, objections to the proposed settlement were received from three class members.

Pamela Minton de Ruiz, daughter of one of the Epstein plaintiffs, objected on the basis that the settlement is collusive. She argues, without any direct evidence of collusion, that the Delaware plaintiffs have colluded with the defendants to settle this action and dispose of the supposedly meritorious federal claims in exchange for an award of attorneys' fees and a de minimis benefit to the class. She argues that the opt out is virtually meaningless because, as a practical matter, "few shareholders will avail themselves of it". She makes this argument

despite that her brothers, David and Andrew Minton, as objectors to the first proposed settlement, strongly argued in favor of the same opt-out provision.

Objector William A. Krupman makes arguments similar to those made by Pamela Minton. Objector Marion Minton, wife of one of the Epstein plaintiffs, also objects to the adequacy of the notice of the settlement given to members of the class because Dean Witter apparently delayed transmitting the notice of the settlement hearing to the owners of shares held in street name by Dean Witter.

II

Chancery Rule 23(e) requires that the Court review proposed settlements of class action suits. The rule is "intended to guard against surreptitious buyouts of representative plaintiffs, leaving other class members without recourse." *Wied v. Valhi, Inc.*, Del.Supr., 466 A.2d 9, 15 (1983), *cert. denied*, 465 U.S. 1026 (1984). This Court must be particularly careful in reviewing a proposed settlement that has the effect of barring claims of at least arguable merit that are not asserted in Delaware but are being asserted in another forum. MCA, 598 A.2d at 695; see also, John C. Coffee, Jr., "Suspect Settlements In Securities Litigation" N.Y.L.J., March 28, 1991, p. 5. This Court's role in reviewing a proposed settlement is to exercise its discretion and to "apply its own business judgment in deciding whether the settlement is reasonable ... ". *Polk v. Good*, Del.Supr., 507 A.2d 531, 535 (1986). The factors to be considered in making this determination include: (1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectability of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectability of a judgment, and (6) the views of the parties involved, pro and con. *Id.* at 536 (citations omitted).

Particular attention must be paid to balancing the value of all the claims being compromised against the value of the benefit to be conferred on the class. *MCA*, 598 A.2d at 691. After

weighing the factors present here, the Court concludes that this settlement, notwithstanding that it has meager value to the class, should be approved as being in the best interests of the class.

As noted in the previous opinion in this case, the claims brought in this Delaware action were "extremely weak and, therefore, have little or no value." *Id.* at 694. At that time, the federal claims had not been litigated and raised issues which had not been "definitively addressed by the courts." *Id.* at 695. This Court therefore was reluctant to approve the settlement that would compromise those claims, despite their somewhat limited merit, particularly when the benefit to be received in exchange was of "illusionary" value to the class. *Id.* at 696.

Now, however, there has been a full hearing on the federal claims and those claims have been rejected on both legal and factual grounds in the U.S. District Court. The Objectors claim that these rulings are erroneous and that there is at least a chance that they will be reversed in a pending appeal. These federal claims, however, obviously now have less economic value than they had before their dismissal.

In determining whether a settlement should be approved, a court should not try the merits of the underlying claims. *MCA*, 598 A.2d at 691. This principle would seem to be especially appropriate where the underlying claims, like the federal claims here, are outside the jurisdiction of this Court.

It is sufficient that the determination of the federal district court that the claims lack merit must be accorded substantial weight in determining the present settlement value of those claims.

In exchange for surrendering the weak claims asserted in this Delaware action and the federal claims which, in light of the adverse federal district court decision, now have greatly diminished settlement value, the class will receive a $2 million cash settlement (less any award of attorneys' fees). As the objectors point out, this amounts to only two to three cents per share. While not a munificent recovery, on balance, the Court finds in its business judgment that it is adequate (if only barely so) to support the proposed settlement. This conclusion is based on the

Court's conclusion that the claims on appeal from the federal district court now have minimal economic value and that there is a provision to optout of the settlement although only eighteen requests for optouts were received from the more than 25,000 shareholders notified. The availability of the right to opt-out of the class protects the ability of class members who find the proposed settlement inadequate to continue the district court litigation.

The three objectors assert, without citing any empirical evidence, that because, as a practical matter, few small shareholders will ever opt-out of a settlement, the proposed settlement will in effect destroy the *Epstein* action as a class action. This argument comes from an unexpected source because the Mintons (two of the three objectors to this settlement) objected to the first proposed settlement solely on the grounds that it did not incorporate an opt-out provision. In any case, this Court's role is to evaluate the economic value of the settlement in its business judgment and not to speculate on why shareholders opt-out of class actions.

The Objectors also argue that this Court should delay its ruling until the Ninth Circuit renders its decision on the appeal of the Epstein action. This Court is most reluctant to take any action that could be construed as attempting to interfere with the appellate process in the federal courts. However, as noted above, the Ninth Circuit denied the Epstein plaintiffs' motion for expedited argument after being advised of the proposed settlement hearing in this Court and there is no indication of when that court might rule. If this Court rejects the settlement, the $2 million dollar benefit will vanish.

The law favors voluntary settlements. *In re* Resorts International Shareholders Litigation Appeals, Del.Supr., 570 A.2d 259, 265-66 (1990). Unless fair settlements are promptly approved, the settlement process will be adversely impacted. Therefore, the Objectors' request that this Court indefinitely delay its review of the settlement must be denied.

Objector Marion Minton also objects to the settlement on the basis that many shareholders whose shares were held in

"street names" by Dean Witter did not receive timely notice. However, the uncontradicted evidence is that the responsibility for any delay rests with Dean Witter. A shareholder who holds her shares in a "street name" assumes responsibility for any delays in notice that are attributable to the delay attendant in forwarding notice through the "street name". *Enstar v. Senouf*, Del.Supr., 535 A.2d 1351, 1354-55 (1987). Nonetheless, as a matter of equity, the proposed order implementing this opinion shall be amended to provide that any opt-outs received after the deadline set forth in the settlement notice but before the date of this decision will be effective.

Finally, the objectors argue that the proposed settlement is collusive. They argue that the defendants "cut a deal" with the plaintiffs and their attorneys in this Delaware action to achieve a settlement of the federal claims which plaintiffs and their attorneys in this litigation were unable to assert (but can only settle) instead of negotiating with the Epstein plaintiffs and their attorneys whom they allege understand the true fair value of those federal claims.

The potential for this type of abuse clearly exists in representative litigation. *See Stepak v. Tracinda Corp.*, Del. Ch., C.A. No. 8457-NC, Allen, C. (Aug. 18, 1989). *slip op.* at 15-16. And when the settling parties have previously proposed a patently inadequate settlement in which the class would have received no monetary benefit but the attorneys would have received $1 million in fees (as the initial, now-rejected, settlement provided), suspicions abound. Suspicion, however, is not enough and the objectors have offered no evidence of any collusion. The proposed settlement must therefore be approved.

III

Plaintiffs' attorneys have applied for a total of $691,057.68 in attorneys' fees and expenses which represents approximately 35% of the settlement fund of $2 million.

The law governing the award of attorneys' fees in corporate litigation is well-established in Delaware. Where the efforts of a plaintiff on behalf of the stockholders of a corporation result in

the creation of a common fund or the conferring of a corporate benefit, the Court may, in its discretion, award attorneys' fees. *Tandycrafts, Inc. v. Initio Partners*, Del-Supr., 562 A.2d 1162, 1164 (1989).

The factor usually accorded the greatest weight in a discretionary award of attorney fees is the benefit produced by the litigation. I/M of the Appraisal of Shell Oil Co., Del. Ch., C.A. No. 8080-NC, Hartnett, V.C. (Oct. 30, 1992); *in re Maxxam Group, Inc. Stockholders Litigation*, Del. Ch., C.A. No. 8636-NC, Allen, C. (Apr. 16, 1987), *slip op.* at 31. "In many, perhaps most, cases it will be clear that the entire benefit is directly and entirely attributable to the litigation." *Id.* However, if the Court determines that the benefit was partly caused by the shareholder litigation and partly caused by the activities of others the award of attorneys' fees will be reduced. *Id.* at 31-34; *Aaron v. Parsons*, Del.Supr., 144 A.2d 155 (1958); *Dow Jones & Co. v. Shields (In re Telerate, Inc. Shareholders Litigation)*, Del. Ch., C.A. No. 11, 115-NC, Hartnett, V.C. (March 4. 1992).

In this litigation, the defendants' willingness to create the settlement fund seems likely to have been motivated as much by their concern as to their potential liability under the federal claims as by their concern for liability under the state law claims which this Court characterized as "extremely weak". *MCA*, 598 A.2d 694. Therefore, although this Delaware action may be the vehicle under which the more meritorious federal claims are settled, this does not mean that the Delaware action was entirely responsible for the benefits produced.

Even if this litigation was responsible for the production of the entire settlement fund, plaintiffs' application for 35% of that fund is excessive considering the factors set forth in *Sugarland Industries, Inc. v. Thomas*, Del.Supr., 420 A.2d 142 (1980). In addition to the value of the benefit, this Court must also consider the stage at which the litigation was concluded and the amount of work necessary to produce the benefit. I/M of the Appraisal of Shell Oil Co., Del. Ch., C.A. No. 8080-NC (Consolidated), Hartnett, V.C. (Oct. 30, 1992), *slip op.* at 19-20 (citing *Sugarland Industries, Inc. v. Thomas*, Del.Supr., 420 A.2d 142 (1980)). While plaintiffs' counsel allegedly expended in excess of

3,300 hours in connection with this litigation, in cases involving shareholder litigation similar to this action, "[t]his Court has properly awarded much less than 25% of the benefit, especially where cases have been settled long before trial." *Id.* at 20 (citations omitted). Ultimately, the amount of attorneys' fees that should be awarded is left to the informed discretion of this Court. *See Tandycrafts, Inc. v. Initio Partners*, Del.Supr., 562 A.2d 1162, 1166 (Chancery Court has "plenary power" over allowance of attorneys' fees). Having considered all the factors discussed in *Sugarland*, especially the meager benefit achieved by the litigation, the stage at which the proceeding was ended, the time and effort of counsel, the relative complexities of the litigation, the contingency factor and the standing and ability of counsel—I find that plaintiffs should be awarded a total of $250,000 in attorneys' fees and expenses.

IV

The settling parties shall submit an amended proposed order.

IN THE
COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE MCA INC. SHAREHOLDERS LITIGATION	CONSOLIDATED C.A. No. 11740

ORDER AND FINAL JUDGMENT

On this 22 day of February, 1993 a hearing having been held before this Court to determine whether the terms of the Stipulation of Settlement dated October 22, 1992 (the "Stipulation"), and the terms and conditions of the settlement proposed in the Stipulation (the "Settlement"), and all transactions referred to therein or preparatory or incident thereto, are fair, reasonable and adequate for the settlement of all claims asserted herein; and whether judgment should be entered in these civil actions (the "Actions") dismissing the Actions on the merits with prejudice as against all of the plaintiffs and all members of the Settlement Class certified in this Court's Order dated October 27, 1992; and the Court having considered all matters submitted to it at the hearing and otherwise and the Court having rendered its Memorandum Opinion dated February 12, 1993 approving the Settlement and awarding attorneys' fees and expenses:

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Notice and Summary Notice (as defined in ¶ 4(b) of the Stipulation), is hereby determined to have been the best practicable notice under the circumstances and in full compliance with Rule 23 of the Court of Chancery and the requirements of due process and it is hereby further determined that the plaintiffs in the Actions, as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class and that the maintenance of this action as a

class action meets all the requirements of Rule 23(a) and (b)(3) of the Court of Chancery.

2. The Stipulation and the Settlement are approved as fair, reasonable and adequate and in the best interests of the plaintiffs and the Settlement Class, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation, provided that any additional Requests for Exclusion received after the deadline set in paragraph 6 of the Hearing Order dated October 7, 1992 but prior to February 12, 1993 will be effective.

3. (a) The Actions are hereby dismissed with prejudice on the merits as to all defendants in the Actions (regardless of whether any such defendant has been served or entered an appearance in any of the Actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lenders, investment bankers, representatives, trustees, affiliates, associates, parents, subsidiaries, general and limited partnerships, heirs, executors, administrators, successors and assigns (including Lazard Freres & Co. (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc. (advisor to Matsushita)) (collectively, the "Released Persons"), as against plaintiffs and all members of the Settlement Class (other than those who have validly requested exclusion therefrom) and their successors and assigns, whether known or unknown, whether directly or in any other capacity, without costs except as provided in the Stipulation, such dismissal to be subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of this Court with reference to the Stipulation.

(b) All claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class (other than those who have validly requested exclusion therefrom), whether directly, derivatively, representatively or in any other capacity, against any of

the Released Persons or against anyone else in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences referred to in the December 4, 1990 Claim Letter and the Amended Complaint in the Action, or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action (all as defined in the Stipulation) (all of which are hereinafter collectively referred to as the "Settled Claims") are hereby compromised, settled, released and discharged with prejudice by virtue of the proceedings herein and this Order and Final Judgment.

4. The plaintiffs and all members of the Settlement Class (other than those who have validly requested exclusion therefrom), their successors and assigns, whether acting directly, derivatively, representatively or in any other capacity, are hereby permanently barred and enjoined from instituting or prosecuting any other action in any court of this or any other jurisdiction based upon, relating to, or for the purpose of enforcing any of the Settled Claims.

5. Plaintiffs' attorneys of record herein are hereby awarded the sum of $250,000 in fees and reimbursement of expenses in connection with the Actions, which sum the Court finds to be fair and reasonable and which shall be paid to plaintiffs' attorneys according to the terms set forth in the Stipulation. Said sum shall accrue interest and be paid in accordance with paragraph 8 of the Stipulation.

/s/

.....

Vice Chancellor

Appendix E

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

IN RE MCA, INC. SHAREHOLDERS LITIGATION	No. 126, 1993 Court Below: Court of Chancery of the State of Delaware in and for New Castle County C.A. No. 11740 Consolidated

Submitted: September 21, 1993
Decided: September 21, 1993

Before MOORE, WALSH and HOLLAND, Justices.

ORDER

This 21st day of September, 1993, the Court having considered this matter at oral argument and having concluded that the same should be affirmed on the basis of and for the reasons assigned by the Court of Chancery in its Opinion dated February 12, 1993, as confirmed by the Order and Final Judgment of February 22, 1993.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be, and the same hereby is,

AFFIRMED.

BY THE COURT:

/s/
Justice

Appendix F

IN THE
COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE MCA INC. SHAREHOLDERS LITIGATION	CONSOLIDATED C.A. No. 11740

NOTICE OF PENDENCY OF CLASS ACTIONS, CLASS ACTION DETERMINATION, PROPOSED SETTLEMENT OF CLASS ACTIONS, SETTLEMENT HEARING, RIGHT TO REQUEST EXCLUSION AND RIGHT TO APPEAR

To: All Record Holders And Beneficial Owners Of Common Stock Of MCA INC. On Or After September 25, 1990, And Their Successors In Interest, Immediate Or Remote. All Record Holders Are Requested By The Court To Forward This Notice To Their Beneficial Owners.

The Notice is given pursuant to Rule 23 of the Court of Chancery of the State of Delaware in and for New Castle County (the "Court") and an Order of the Court (the "Hearing Order") entered in the above-captioned consolidated action to inform you of these pending lawsuits (the "Delaware Actions"), to advise you of a proposed settlement of the Delaware Actions and of your rights, among other things, to exclude yourself from the proposed settlement, to participate in the hearing on, or to object to, the proposed settlement and to give you notice of a hearing to be held by the Court of Chancery of the State of Delaware in and for New Castle County on January 21, 1993, at 12:00 noon to determine whether the proposed settlement should be approved as fair, reasonable, and adequate and to consider the application by plaintiffs' counsel for attorneys' fees and costs.

NOTICE TO PERSONS HOLDING RECORD OWNERSHIP ON BEHALF OF OTHERS

If you were a record (but not the beneficial) owner of common stock of MCA INC. ("MCA" or the "Company"), on September 25, 1990, or any time thereafter, through and including January 3, 1991, you should within fourteen (14) days of the receipt of this Notice, either (a) forward this Notice to each such beneficial owner or (b) mail a list of the names and addresses of each such beneficial owner to Simpson Thacher & Bartlett, 425 Lexington Avenue, New York, New York 10017, (212) 455-3849, Attention: Alex Fan, with a request that copies of the Notice be mailed to such beneficial owners. If you are a nominee holder and wish additional copies of this Notice, additional copies of this Notice will be made available to you for this purpose upon request directed to the foregoing address or telephone number. Nominee holders will be reimbursed their reasonable costs and expenses incurred in complying with the foregoing directives of this paragraph.

NO OPINION EXPRESSED BY THE COURT AS TO THE MERITS

This Notice is not an expression by the Court as to the merits of any claims or defenses asserted by the parties in the Delaware Actions.

BACKGROUND AND DESCRIPTION OF THE ACTIONS

The following is a summary of certain of the facts and procedural history underlying the instant litigation and the Settlement. A more detailed summary of the background of the transactions in question appears in the Offer to Purchase dated November 30, 1990 and the Solicitation/Recommendation Statement of MCA INC. which were mailed on or about November 30, 1990 to holders of record of common stock of MCA. Copies of the Offer to Purchase and MCA's Recommendation are contained in the Tender Offer Statement Pursuant to Section

14(d)(1) of the Securities Exchange Act and the Schedule 14D-9 Pursuant to Section 14(d)(4) of the Securities Exchange Act, respectively, which schedules are on file at the Securities and Exchange Commission in Washington, D.C.

On September 25, 1990, it was reported in the financial press that MCA was discussing a possible acquisition of MCA by Matsushita Electric Industrial Co., Ltd. ("Matsushita").

On September 26, 1990 and September 27, 1990, three putative class actions, brought on behalf of all public shareholders of MCA, were filed in the Court of Chancery, entitled *Lazar, et al. v. MCA INC., et al.*, No. 11740 (filed Sept. 26, 1990) (the "*Lazar* Action"); *Stepak, et al. v. MCA INC., et al.*, No. 11741 (filed Sept. 26, 1990); and *Naphtali, et al. v. MCA INC., et al.*, No. 11747 (filed Sept. 27, 1990) (collectively, unless otherwise indicated, the "Delaware Actions"). The Delaware Actions sought, among other things, an order directing MCA to take all appropriate steps to effectively expose MCA to the marketplace in an effort to obtain a transaction which would yield the greatest value for the stockholders of the Company. Named as defendants in the Delaware Actions were MCA and its directors: Lew R. Wasserman ("Wasserman"), Thomas V. Jones, Robert S. Strauss, Thomas Wertheimer, Howard H. Baker, Jr., Thomas P. Pollack, Felix G. Rohatyn, Signey J. Sheinberg ("Sheinberg"), Howard P. Allen, Mary Gardiner Jones, and Charles S. Paul. Upon consent of all parties, and by Stipulation and Order dated October 2, 1990, the Court consolidated the Delaware Actions under the Caption *In Re MCA INC. Shareholders Litigation*, Consolidated C.A. No. 11740; designated the Complaint in the *Lazar* Action as the Complaint in the Delaware Actions; and appointed as co-lead counsel the firms of Milberg Weiss Bershad Specthrie & Lerach; Abbey & Ellis; Berger & Montague; and Wolf, Popper, Ross, Wolf & Jones ("Plaintiffs' Lead Counsel").

On September 26, 1990, a putative class action, brought on behalf of all public shareholders of MCA, was filed in the Superior Court of California, entitled *Lazar, et al. v. MCA INC., et al.*, No. BC011305, and on October 2, 1990, a stockholders' derivative action, brought on behalf of MCA, was filed in the

Superior Court of California, entitled *MCA INC., derivatively by Robert Silverstein v. Lew R. Wasserman, et al.*, Case No. BC011572 (collectively, the "California State Actions"). The California State Actions (which were ultimately dismissed without prejudice on September 4, 1991), asserted substantially similar claims and sought substantially similar relief as the claims asserted and the relief sought in the Delaware Actions.

On November 26, 1990, MCA and Matsushita announced that they had entered into an Agreement and Plan of Merger (the "Merger" and the "Merger Agreement"). Pursuant to the Merger Agreement, Matsushita Acquisition Corp. ("Matsushita Acquisition"), an indirectly wholly-owned subsidiary of Matsushita, agreed, among other things, to make a tender offer for all outstanding shares of MCA common stock at $66 per share (the "Tender Offer"). Following successful completion of the Tender Offer, upon the terms and subject to the conditions of the Merger Agreement and the Delaware General Corporation Law, Matsushita Acquisition Corp. merged with and into MCA, effective January 3, 1991. The Merger consideration was the same price per share paid in the Tender Offer.

Pursuant to a Capital Contribution and Loan Agreement (the "Capital Contribution Agreement") between Lew R. Wasserman, Matsushita, and Matsushita Holding Corp. ("Matsushita Holding"), a wholly-owned subsidiary of Matsushita, Wasserman agreed to and did contribute, following the acceptance for payment of MCA shares in the Tender Offer, 4,953,927 shares of MCA common stock in exchange for preferred stock in Matsushita Holding. The Preferred stock received by Wasserman had an aggregate liquidation preference equal to $66 multiplied by the number of shares of common stock contributed by Wasserman. The Preferred Stock provides for the payment of an annual cumulative 8.75% dividend.

MCA also entered into certain employee compensation arrangements (as described in the Solicitation/Recommendation Statement of MCA filed on November 30, 1990 on SEC Schedule 14D-9). Matsushita further entered into agreements with

Sidney J. Sheinberg and David Geffen (the "Tender Agreements") providing for such individuals to tender their MCA shares into the Tender Offer.

MCA and an MCA subsidiary which held MCA's broadcasting assets simultaneously entered into a separate Distribution Agreement pursuant to which ownership of MCA's broadcasting assets were spun-off 100% to the MCA shareholders. The consummation of the Tender Offer for MCA's shares was conditioned upon MCA's broadcasting assets having been spun-off. The material terms of the above-mentioned agreements have been publicly available since November 30, 1990 and are further described in the Offer to Purchase and MCA's Recommendations referred to above.

Following public announcement of the Merger Agreement, counsel for plaintiffs in the Delaware Actions informed counsel for defendants that they intended to seek preliminary injunctive relief against consummation of the Merger Agreement, and they initially undertook to state the bases for such injunction motion and describe the claims against the Merger Agreement in writing by December 4, 1990, and later to file an amended complaint.

By letter dated November 27, 1990, the Delaware Chancery Court advised plaintiffs that their application for preliminary injunctive relief would be heard on December 20, 1990. The hearing date was subsequently changed to December 18, 1990.

By letter to defendants' counsel dated December 4, 1990 (sometimes referred to as the "December 4, 1990, Claim Letter"), pursuant to a stipulated procedure submitted to the Court, co-lead counsel for plaintiffs in the Delaware Actions set forth the claims upon which plaintiffs based their motion for a preliminary injunction. These claims advanced by plaintiffs included, among other things, the claims that (i) defendants failed to fulfill their duty to maximize shareholder value and had failed to obtain fair value in the Merger Agreement; (ii) defendants had breached their duty of making fair and full disclosures concerning the Merger Agreement, including, among other things, failing to disclose material facts concerning the compensation and

bonus payments to certain individuals contemplated in the Merger Agreement, and that defendants allegedly intended to retain control over WWOR-TV following spin-off of MCA's broadcast assets to shareholders; (iii) defendants breached their duty of candor by failing to disclose material information concerning the operating segments of MCA that was provided to Matsushita; (iv) defendants breached their fiduciary duties by according "preferential treatment" to defendant Lew R. Wasserman in connection with the Tender Offer, in that "Mr. Wasserman . . . impermissibly negotiated preferential arrangements in connection with the transaction whereby he . . . exchange[d] stock for stock and avoid[ed] costly capital gains taxes to which all other stockholders [were] subject"; and (v) defendants violated SEC Rule 13e-3 because Mr. Wasserman's receipt of preferred stock allegedly established that the transaction was a "going-private" transaction under SEC Rule 13e-3 of the Securities Exchange Act of 1934, and defendants allegedly failed to comply with the requirements of SEC Rule 13e-3 governing such transactions. The December 4 Claim Letter stated that plaintiffs' counsel intended to consider whether to modify and/or supplement the claims and legal theories contained in the Claim Letter as discovery and briefing proceeded.

On December 3, 1990, a putative class action complaint entitled *Epstein v. MCA INC. et al.*, No. CV-90-6451-R, brought on behalf of a class of all shareholders of MCA, was filed in the United States District Court for the Central District of California (the "Federal District Court") (hereinafter, the "*Epstein* Action"). The complaint in the *Epstein* Action, as amended on December 6, 1990, alleged that the arrangements whereby defendant Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding pursuant to the Capital Contribution Agreement (i) violated SEC Rule 10b-13 because it allegedly entailed a purchase of MCA stock by Matsushita outside the Tender Offer during the Tender Offer period, and (ii) violated SEC Rule 14d-10 because the preferred stock received by Wasserman allegedly was different or greater consideration than that made available to public shareholders in the Tender Offer. The complaint was subsequently amended to include a

similar claim under SEC rules 10b-13 and 14d-10 that a payment to defendant Sheinberg, which defendants asserted was a bonus payment derived from the level of incentive compensation that had been expected to be awarded to Sheinberg in the ordinary course but for the acquisition, allegedly constituted additional consideration for his MCA shares. The complaint sought preliminary and permanent injunctive relief and monetary damages. The *Epstein* Action complaint, as subsequently amended, named as defendants MCA, Matsushita, Matsushita Acquisition, Matsushita Holding, Wasserman and Sheinberg.

In or around the beginning of December 1990, plaintiffs' counsel in the Delaware Actions obtained extensive document discovery from defendants and their financial advisors, and thereafter took the depositions of certain defendants (including defendants Wasserman, Sheinberg and Howard P. Allen).

Commencing on or about November 29, 1990, counsel for defendants and counsel for plaintiffs engaged in discussions concerning possible settlement of the dispute between the parties. Thereafter, a meeting was held between counsel for the parties and settlement negotiations began in earnest. During those settlement discussions, which continued through December 11, 1990, plaintiffs sought to enhance the terms of the transaction and in particular, sought improvements in the terms of the shareholder rights plan of the spin-off company with a view towards increasing the value of the shares of the spin-off company to be distributed to MCA shareholders.

Following these negotiations, on December 11, 1990, an agreement in principle between the parties hereto was reached providing (as further described below) for the compromise, release and settlement of the claims asserted in the Delaware Actions, the California State Actions, and the *Epstein* Action (hereinafter, the "Initial Proposed Settlement").

On December 11, 1990, the Federal District Court was advised of the existence of the Initial Proposed Settlement and set December 28, 1990, as the date for a hearing on a motion for

summary judgment made by the *Epstein* plaintiff, who contended that the Tender Offer violated SEC Rules 10-b-13 and 14d-10 and should be enjoined. Counsel for plaintiff in the *Epstein* Action stated that his client in *Epstein*, a member of the proposed class in the Delaware Actions, would seek to exclude himself from the Initial Proposed Settlement and that he wished to continue to litigate the claims asserted in the *Epstein* complaint.

An amended consolidated complaint (the "Amended Complaint") in the Delaware Actions was filed on December 14, 1990, which encompassed the claims set forth in the December 4, 1990, Claim Letter. The defendants in the Amended Complaint are MCA, Matsushita, Matsushita Holdings, Matsushita Acquisition, Wasserman, Sheinberg, Thomas P. Pollack, Thomas Wertheimer, Charles S. Paul, Hoard H. Baker, Robert S. Strauss, Felix G. Rohatyn, Thomas V. Jones, Howard P. Allen and Mary Gardiner Jones, all of whom are alleged to have participated in the wrongs alleged in the Amended Complaint. The claims alleged in the Amended Complaint are, *inter alia*, that (i) the individual defendants breached their fiduciary duty to MCA's shareholders by failing to adopt methods calculated to obtain the highest per share value in the sale of MCA, including their alleged failure to use "market check" mechanisms to assure the fairness of the acquisition terms; (ii) the individual defendants breached their fiduciary duty to MCA's shareholders by failing to obtain a fair price per share in the sale of MCA; (iii) the individual defendants treated Matsushita as a preferred bidder, in alleged violation of their fiduciary duty; (iv) the individual defendants, MCA and Matsushita entered into allegedly impermissible preferential treatment arrangements for the treatment of defendant Wasserman's MCA's stock holdings, specifically with respect to the transaction by which he exchanged his MCA stock for preferred stock of a Matsushita subsidiary pursuant to the Capital Contribution Agreement, and that the purpose of such preferential treatment was to allow defendant Wasserman to avoid tax liability on the sale of his MCA stock, which other MCA stockholders will not be able to avoid; (v) the disclosures made by defendants in connection with the Tender Offer,

including without limitation the disclosures contained in Matsushita's Offer to Purchase and Schedule 14D-1, and the disclosures contained in MCA's Schedule 14D-9, were deficient and contain material omissions and misrepresentations, including omissions and misrepresentations with respect to the disclosure of the arrangement concerning receipt of preferred stock by defendant Wasserman pursuant to the Capital Contribution Agreement, and with respect to arrangements regarding benefits and compensation for members of MCA management; (vi) that the MCA board was allegedly not composed of a majority of directors without conflicts of interest with respect to the Merger Agreement; (vii) that the individual defendants allegedly intended to retain effective control over MCA's broadcasting assets after the spin-off of such assets, and that defendants—through adoption of an overly restrictive "poison pill" shareholders rights plan—intended to prevent the emergence of market forces which could result in a sale of the spin-off company at a price representing maximum value for shareholders; (viii) that defendants breached their duty of candor by failing to disclose certain allegedly material information concerning the operating segments of MCA, which information was allegedly provided to Matsushita; (ix) that defendants failed to disclose, in violation of their duty of candor, certain prior market contacts between MCA and other potential purchasers and other material information required to be disclosed pursuant to SEC Rule 13e-3; (x) that the arrangements for employee compensation, including certain employment agreements, bonus payments, and payments with respect to options, violated defendants' fiduciary duties and were not fully and fairly disclosed; and (xi) the individual defendants agreed in the Merger Agreement to treatment of MCA's Yosemite assets that was allegedly not in the best interests of MCA's shareholders. The Amended Complaint seeks predominantly equitable relief, or, alternatively, damages.

On December 17, 1990, a Stipulation of Settlement was executed between counsel for the parties to the Delaware Actions reflecting the terms of the Initial Proposed Settlement (hereinafter, the "Initial Stipulation"). Pursuant to the Initial Stipulation:

1. MCA agreed, *inter alia*, to cause its wholly-owned subsidiary holding its broadcast assets, which by the terms of a Distribution Agreement entered into simultaneously with the Merger Agreement was to be spun-off to MCA shareholders pro rata prior to Matsushita's purchase of shares pursuant to the Tender Offer (the "Spin-off Company"), to adopt a common stock shareholder rights plan that provided, *inter alia*, that, if a fully financed cash tender offer for all of the shares of Spin-off Company common stock was commenced and held open for at least 60 days, then the rights would be automatically redeemed at the redemption price of one cent per share immediately prior the closing of such offer, provided that at least 66⅔% of the outstanding shares of Spin-off Company common stock were tendered into such offer and not withdrawn; that the "flip-in" threshold under such Rights Plan would be 15%; and that these provisions would not be amended for a period of at least one year from the adoption of the plan; and

2. Subject to Court approval, all claims and causes of action asserted in the Delaware Actions, the California State Actions, and the *Epstein* Action, including all claims arising under Delaware common law and the federal securities laws (including the federal securities laws claims asserted in the *Epstein* Action), would be settled, released and discharged; and

3. Counsel for the parties agreed to request the Court to enter an order providing that the Delaware Actions may proceed for settlement purposes as a class action, pursuant to Chancery Court Rules 23(b)(1) and (b)(2), on behalf of all holders of MCA common stock from September 25, 1990, and their successors in interest, immediate or remote (excluding defendants and members of their immediate families) (hereinafter, the "Initial Settlement Class").[45]

[45] In August 1992, all of the common shares of the Spin-Off Company (which was named Pinelands, Inc.) were acquired at a cash price of $18.1184 per Pinelands, Inc. share by BHC Communications Inc. pursuant to an Agreement and Plan of Merger dated as of May 7, 1992.

On December 18, 1990, this Court entered an Order which, among other things, provisionally certified the Initial Settlement Class pursuant to Rules 23(b)(1) and (2) of the Court of Chancery; scheduled a hearing for January 30, 1991, to determine whether the Initial Settlement embodied in the Initial Stipulation was fair, reasonable and adequate and should be approved by the Court; and provided for the mailing of notice of the Initial Settlement to members of the Initial Settlement Class.

On December 28, 1990, the Federal District Court denied the *Epstein* plaintiff's motion for summary judgment. No appeal therefrom was sought to be taken. The Tender Offer expired as scheduled on December 29, 1990, with virtually all of the MCA common shares having been tendered. A second-step cash merger was then consummated on January 3, 1991, by which MCA became a wholly-owned subsidiary of Matsushita.

On January 23, 1991, David Minton and Andrew Minton (purported shareholders of MCA), served a Notice of Intent to Appear and Object to the Initial Proposed Settlement (hereinafter, the "Objection" and the "Objectors"). In principal part, the Objectors argued that the Initial Proposed Settlement improperly purported to release and discharge the claims asserted in the *Epstein* Action without affording members of the putative class the opportunity to opt out of the class and thus not be bound by the proposed release of the federal securities claims contained in the Initial Stipulation and that the claims asserted in the *Epstein* Action were substantial and valuable claims.

On January 30, 1991, a hearing was held before this Court in accordance with the December 18, 1990, Order during which the Court heard and considered, *inter alia*: (i) plaintiffs' application for final approval of the Initial Proposed Settlement; (ii) the arguments pursuant to the Objection; and (iii) plaintiffs' counsels' application for attorneys' fees and reimbursement of expenses.

On April 22, 1991, this Court rendered its decision and order (the "Decision and Order") with respect to plaintiffs' application for final approval of the Initial Proposed Settlement and the arguments raised by the Objectors. Pursuant to the Decision and Order, the Court ruled, *inter alia*, that certification

of the Initial Settlement Class pursuant to Chancery Court Rule 23(b)(2) was appropriate, and that contrary to the arguments raised by the Objectors, no opportunity to opt out by members of the Initial Settlement Class was required. However, the Court rejected plaintiffs' application for final approval of the Initial Proposed Settlement, concluding in this regard that the benefits to be conferred pursuant to the Initial Proposed Settlement were not sufficient consideration of the release and dismissal of the claims asserted in the Delaware Actions and the federal claims asserted in the *Epstein* Action. The Court stated in its Decision and Order, *inter alia,* that the state law claims proposed to be settled had "little or no merit and therefore no value"; that the value of the Initial Proposed Settlement was "also minimal"; and that the federal claims asserted in the *Epstein* Action "have at least arguable merit and therefore significant value." As to such federal claims, the Court found that the issues raised by such claims had "not yet been definitively addressed by the courts" and therefore the claims had "arguable merit." the Court concluded "that it would be unfair to bar the federal claims and therefore the settlement cannot be approved in its present form."

During December 1990 and January 1991, four purported class actions, brought on behalf of MCA shareholders, were filed in the Federal District Court, entitled *Linder v. MCA INC. et al.*, No. CV-90-6744-KN (filed on December 18, 1990) (the "*Linder* Action"); *Rockford v. MCA INC., et al.*, No. CV-90-6744-JMI (filed on December 18, 1990) (the "*Rockford* Action"); *Karlin, et al. v. MCA INC., et al.*, No. CV-90-6775-R) (filed December 18, 1990) (the "*Karlin* Action"); and *Minton v. MCA INC., et al.*, No. CV-91-0336-R (filed on January 17, 1991 (the "*Minton* Action"). The *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action assert substantially similar claims and seek substantially similar relief as the claims asserted and the relief sought in the *Epstein* Action. Unless otherwise indicated, the *Epstein* Action, the *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action—all of which were consolidated by the Federal District Court on April 1, 1991—are collectively referred to herein as the "California Federal Actions", and the plaintiffs in the California Federal Actions are hereinafter referred to as the "Federal Plaintiffs."

Subsequent to the Court's Decision and Order, the following events occurred in one or all of the California Federal Actions: (i) On April 1, 1991, the Federal District Court denied the second motion by one of the Federal Plaintiffs for summary judgment on the SEC Rule 10b-13 and 14d-10 claims, and denied the Federal Plaintiffs' first motion for class certification; (ii) On July 1, 1991, the Federal District Court granted the Matsushita defendants' motion to dismiss the claims asserted against them under SEC Rule 10b-13 on the ground that no private right of action exists under that provision, and dismissed all claims asserted against MCA and Messrs. Wasserman and Sheinberg for failure to state a claim as to them; (iii) On September 3, 1991, the Federal District Court denied the Federal Plaintiffs' second motion for class certification; (iv) On November 4, 1991, prior to the completion of discovery, the Federal District Court denied a motion for summary judgment by the Matsushita defendants against the remaining Rule 14d-10 claim, while also denying the third motion for summary judgment by the Federal Plaintiffs; (v) On December 9, 1991, the Federal District Court enjoined the Federal Plaintiffs and their counsel from commencing any new litigation arising out of the MCA acquisition against any defendant in the California Federal Actions or amending the pleadings to add new parties in any previously-filed actions against any defendant in the actions relating to the MCA acquisition in any forum without prior leave of the Federal District Court; (vi) On December 16, 1991, the Federal District Court denied the Federal Plaintiffs' motion to amend their complaint to assert additional claims under Sections 14(d)(7) and 14(e) of the Williams Act; (vii) On January 6, 1992, the Federal District Court denied plaintiff in the *Minton* Action leave to amend his complaint to assert a claim under Section 14(d)(7) of the Williams Act; (viii) On January 13, 1992, the Federal District Court permitted the voluntary dismissal of all of the plaintiffs in the *Karlin* Action from the California Federal Actions; (ix) On January 27, 1992, after full briefing and a hearing, the Federal District Court found each of the Federal Plaintiffs, including the *Karlin* plaintiffs, and their counsel, in contempt of Court for their continued failure to provide Matsushita with all discovery ordered to be produced in the Federal

District Court's Order of November 4, 1991, and subsequently awarded sanctions to Matsushita in the amount of $15,000; (x) on February 10, 1992, the day before trial on the merits was set to commence, and after the completion of discovery, the Federal District Court granted the Matsushita defendants' motion for summary judgment dismissing the remaining claim under SEC Rule 14d-10 and permanently enjoined the Federal Plaintiffs and their counsel, and all persons in active concert or participation with them (or having notice of the order), from commencing litigation in any forum involving claims or defenses arising out of the same transactions as the California Federal actions between the parties, without prior leave of the Federal District Court; (xi) On March 3, 1992, upon the Matsushita defendants' motion to supplement the record, the Federal District Court found that plaintiff and purported class representative Lawrence Epstein prosecuted the California Federal Actions for 15 months under false pretenses because he deliberately concealed that the MCA stock owned by him was held in a tax-free individual retirement account. The Federal District Court found that this fact demonstrated that plaintiff Epstein did not and could not have sustained any injury as a result of the Tender Offer, and, if known, would have disqualified him as a plaintiff in the California Federal Actions.

Plaintiffs in the California Federal Actions have appealed the Federal District Court's dismissals of their actions to the United States Court of Appeals for the Ninth Circuit. The Federal Plaintiffs have also appealed the denials of their motions for class certification and other rulings made by the Federal District Court, including the contempt ruling referred to above.

On October 30, 1991, David and Andrew Minton, children of plaintiff Walter Minton, filed a putative class action complaint in the Federal District Court, entitled *Minton, et al. v. MCA INC., et al.*, No. CV-91-5914-R (hereinafter, the "Second *Minton* Action"). The complaint in the Second *Minton* Action, as amended on December 9, 1991, sought monetary damages for alleged violation of SEC Rules 10b-13 and 14d-10 and Section 14(d)(7) of the Williams Act. The amended complaint alleged that the arrangements whereby defendant Wasserman exchanged his MCA stock for preferred stock in Matsushita

Holding Corp. pursuant to the Capital Contribution Agreement (1) violated SEC Rule 10b-13 because it allegedly entailed a purchase of MCA stock by Matsushita during the period covered by the Rule that was not pursuant to the Tender Offer, and (2) violated Section 14(d)(7) of the Williams Act and SEC Rule 14d-10 because such preferred stock received by Wasserman allegedly represented different and/or greater consideration than that made available to public shareholders in the Tender Offer. By Order dated February 11, 1992, the Federal District Court granted defendants' motion to dismiss the amended complaint, finding that it was filed in bad faith and that plaintiffs and their father, Walter Minton, were aligned in interest. Plaintiffs David and Andrew Minton have appealed the Federal District Court's dismissal of their complaint to the United States Court of Appeals for the Ninth Circuit. The appeals filed in the California Federal Actions and the Second Minton Action (Nos. 92-55288, 92-55632, 92-55675, 92-55677) are pending, with briefing scheduled to be completed by the end of this year, and no date for argument of the appeals has been set by the Court.

On November 4, 1991, a putative class action, allegedly brought on behalf of all shareholders of MCA as of the close of trading on November 23, 1990, was commenced against Lazard Freres & Co. ("Lazard") in the Supreme Court of the State of New York, County of New York, entitled *Epstein v. Lazard Freres & Co.*, No. 31127/91 (hereinafter, the "Second *Epstein* Action"). The complaint in the Second *Epstein* Action alleged that Lazard, which served as financial advisor to MCA in connection with its acquisition by Matsushita, was negligent and breached a fiduciary duty in its advice to MCA concerning the fairness of the transaction price, and that Lazard had a conflict of interest with respect to its MCA engagement. The complaint seeks damages, and alleges that the difference between the value paid to the shareholders in the acquisition and "fair value" represents "damages of no less than approximately $250 million and possibly as much as $1.2 billion."

By decision dated September 24, 1992, the New York court granted a motion by Lazard to dismiss the Second *Epstein* Action with prejudice under principles of *res judicata* in light of

the entry of judgment in favor of the defendants and against the plaintiffs in the California Federal Actions.

From and after this Court's Decision and Order declining to approve the Initial Proposed Settlement, counsel for the parties in the Delaware Actions continued to discuss a possible alternative resolution of the Delaware Actions. In or around February 1992, following the Federal District Court's decision to dismiss the remaining claim in the California Federal Actions, these discussions developed into negotiations in earnest regarding an alternative settlement of the Delaware Actions. On June 18, 1992, counsel for the parties arrived at an agreement in principle to settle the Delaware Actions, subject to the execution of a formal Stipulation of Settlement and Court approval thereof.

CLASS ACTION DETERMINATION

The Hearing Order provides that the Delaware Actions shall and may be maintained as a class action, for purposes of settlement only, by the plaintiffs as class representatives and by their counsel as class counsel, pursuant to Chancery Rules 23(a) and (b)(3), on behalf of a class consisting of all holders of MCA common stock on and after September 25, 1990, and their successors in interest, immediate or remote, through and including effectuation of the Merger on January 3, 1991 (excluding defendants and their immediate families) (hereinafter, the "Settlement Class" and the "Class Period"). The Hearing Order also provides that members of the Settlement Class may exclude themselves from the Settlement Class if they so desire, as further described below under the heading "Right to Request Exclusion."

THE SETTLEMENT

Pursuant to the proposed Settlement, defendants have agreed that, in consideration for the dismissal of the Delaware Actions and the release and settlement of the Settled Claims (as defined below), defendants will deposit $2,000,000 (plus interest as described below) into a settlement fund (the "Settlement Fund") to be distributed *pro rata* to those members of the

Settlement Class whose shares of MCA common stock were purchased pursuant to the Tender Offer or were cashed out or converted pursuant to the Merger, as reflected on the records of MCA's transfer agent, such monies to be deposited at such time as the Settlement shall become final in accordance with its terms. According to MCA's records of stockholders, and subject to reduction by the number of shares of MCA common stock formerly held by persons who file valid Requests for Exclusion from the Settlement Class (as described below), distribution of the Settlement Fund would be pro-rated among the former holders of approximately 78 million MCA shares. The Settlement also provides that beginning on the next business day after an Order and Final Judgment is entered by the Court of Chancery, the Settlement Fund shall accrue interest at a compound rate of 3% per annum and continue to earn interest at such rate until the Settlement Fund is fully and finally distributed pursuant to the terms of the Stipulation.

In consideration of the foregoing, pursuant to the proposed Settlement plaintiffs in the Delaware Actions have agreed to dismiss, release, and discharge the Settled Claims (as defined below) against the Released Persons (as defined below). Thus, the Stipulation provides that, if the Settlement is approved by the Court, all claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, the rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class, whether directly, derivatively, representatively or in any other capacity, against any of the named defendants in the Delaware Actions (regardless of whether such defendant has been served or entered an appearance in any of the actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lenders, investment bankers, representatives, trustees, affiliates, associates, parents, subsidiaries, general and limited partners and partnerships, heirs, executors, administrators, successors, and assigns, including without limitation Lazard (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc.

(advisor to Matsushita) (the "Released Persons"), or against anyone else in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences referred to in the December 4, 1990, claim letter or the Amended Complaint in the Delaware Actions, or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action (all of which are hereinafter collectively referred to as the "Settled Claims"), shall be compromised, settled, released and discharged with prejudice.

REASONS FOR SETTLEMENT

Plaintiffs' attorneys in the Delaware Actions represent that as a result of extensive investigation of the facts and examination of applicable law, including depositions and review of thousands of pages of documents relating to the transactions complained of, plaintiffs and their attorneys have concluded that it is desirable and in the best interests of the members of the Settlement Class to settle the litigation upon the terms and conditions set forth in the Stipulation of Settlement. In reaching their conclusion to settle the Delaware Actions on the terms negotiated, these plaintiffs and their attorneys have concluded that the terms and conditions of the proposed Settlement are fair, reasonable and adequate, and have agreed to settle the Delaware Actions, pursuant to the terms and provisions of the Stipulation, after considering (i) the substantial monetary benefits that former MCA shareholders will receive pursuant to the Settlement; (ii) the Court's evaluation of the claims asserted in the Delaware Actions as reflected in the Decision and Order; (iii) the attendant risks and delays of continued litigation; (iv) uncertainties relating to proof of the allegations asserted in the Delaware Actions; (v) the Federal District Court's disposition of the federal securities claims asserted in the California Federal Actions and the Second

Minton Action; (vi) the impact of principles of *res judicata* on the viability of the Second *Epstein* Action in light of the Federal District Court's disposition of the California Federal Actions, including the decision of the New York Court to dismiss the Second *Epstein* Action with prejudice on *res judicata* grounds; and (vii) the fact that the present Settlement provides a mechanism for members of the Settlement Class to exclude themselves from the Settlement Class should they so desire and thereby not to be precluded by the Settlement from individually seeking to pursue the claims alleged in the Delaware Actions, the California Federal Actions, the Second *Minton* Action, the Second *Epstein* Action or any other claims relating to the events at issue in the Delaware Actions.

DEFENDANTS' DENIAL OF LIABILITY

Defendants vigorously deny all liability with respect to the facts and claims alleged in the Delaware Actions, but consider it desirable that they be settled and dismissed because such settlement and dismissal would: (i) avoid the substantial burden, expense, inconvenience and distraction of continued litigation; and (ii) put the Settled Claims to rest.

NOTICE OF HEARING

Notice is hereby given that a hearing will be held before the Court in the Public Building, 11th and King Streets, Wilmington, Delaware 19801, on January 21, 1993 at 12:00 noon (the "Hearing") (or at such adjourned time as the Court may, without further notice, direct) to determine (a) the fairness, reasonableness, and adequacy of the terms of the Stipulation of Settlement, and (b) whether an order and final judgment should be entered approving the proposed settlement and compromise and dismissing on the merits and with prejudice the Delaware Actions against the defendants and to hear plaintiffs' application for an order allowing payment to plaintiffs in the Delaware Actions for reasonable attorneys' fees and expenses in connection with the Delaware Actions, as more fully described below under the heading "Attorneys' Fees and Expenses."

The Court has reserved the right to adjourn the Hearing from time to time at such hearing or any adjournment thereof, by announcement at the Hearing or any adjournment thereof. The Court has also reserved the right to approve the Stipulation of Settlement, with or without modifications, and to enter its final judgment dismissing the Delaware Actions as to defendants on the merits and with prejudice and to approve the payments of plaintiffs' attorneys' fees and expenses without further notice of any kind.

RIGHT TO REQUEST EXCLUSION

All members of the Settlement Class have the option of excluding themselves from the Settlement Class by mailing a timely and valid Request for Exclusion postmarked no later than twenty (20) days prior to the Settlement Hearing to In re MCA INC. Shareholders Litigation, P.O. Box 92, Wilmington, DE 19899.

As set forth above, the Settlement provides for the release and discharge as to members of the Settlement Class of the claims alleged in the Delaware Actions, as well as those alleged in the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action. By filing a valid Request for Exclusion, a member of the Settlement Class will not be precluded by the Settlement from individually seeking to pursue the claims alleged in the Delaware Actions, the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action, or any other claim relating to the events at issue in the Delaware Actions. Accordingly, any member of the Settlement Class who is considering whether to exercise his or her right of exclusion as descried herein may wish to consider the status of these proceedings and the Federal District Court's disposition of the claims asserted in the California Federal Actions and the Second *Minton* Action. *See* "Background and Description of the Actions." For further information concerning the California Federal Actions and the Second *Minton* Action, you are referred to the documents filed with the United States District Court for the Central District of California, 312 North Spring Los Angeles,

California 90012. For further information concerning the Second *Epstein* Action, you are referred to the documents filed with the Supreme Court for the State of New York, County of New York, 60 Centre Street, New York, New York 10007.

A Request for Exclusion must set forth the following information with respect to the person or entity requesting exclusion: name, address, social security or taxpayer identification number, the amount of all MCA common stock you owed during the Class Period (*i.e.*, the number of shares held or purchased on September 25, 1990 to January 3, 1991, the date of each purchase or sale (if any), during such period and the number of shares in any such transaction. All Requests for Exclusion must be signed by or on behalf of the person or entity so requesting exclusion.

If a Request for Exclusion does not include all of the foregoing information, it shall not be a valid Request for Exclusion and the person or entity filing an invalid Request for Exclusion shall be a member of the Settlement Class. *All persons who properly file Requests for Exclusion from the Settlement Class shall not be members of the Settlement Class and shall have no rights with respect to the settlement and no interest in the Settlement Fund.*

RIGHT TO APPEAR

Any person who has not requested exclusion from the Settlement Class who objects to the Stipulation, the Settlement, the judgment to be entered herein, or the award of attorneys' fees and expenses to plaintiffs' counsel, or who otherwise wishes to be heard, may appear in person or by his attorney at the Hearing and present any evidence or argument that may be proper and relevant. However, no such person shall be heard and no papers, briefs, pleadings or other documents submitted by any person shall be received and considered by the Court (unless the Court in its discretion shall thereafter otherwise direct, upon application of such person and for good cause shown), unless no later than twenty (20) days prior to the Hearing directed herein to be held on January 21, 1993, at 12:00 noon, such person shall file

with the Register in Chancery and, before such filing, shall serve upon:

Joseph A. Rosenthal, Esq.
ROSENTHAL, MONHAIT,
GROSS & GODDESS, P.A.
First Federal Plaza
P.O. Box 1070
Wilmington, Delaware 19899

On Behalf Of All Plaintiffs

Martin P. Tully, Esq.
MORRIS, NICHOLS, ARSHT &
TUNNELL
1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 10900

On Behalf Of Defendant MCA INC.
And The Individual Defendants

-and-

R. Franklin Balotti, Esq.
RICHARDS, LAYTON
& FINGER
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899

On Behalf Of Defendants Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corp. And Matsushita Acquisition Corp.

(a) notice of intention to appear; (b) a detailed statement of such person's specific objections to any matter before the Court; (c) proof of membership in the Settlement Class; and (d) the grounds for such objections and any reasons why such person

desires to appear and to be heard, as well as all documents or writings which such person desires this Court to consider.

Unless the Court otherwise directs, no person shall be entitled to object to the approval of the Stipulation of Settlement, the Settlement, the judgment to be entered herein, or the award of attorneys' fees and expenses to plaintiffs' counsel, or otherwise to be heard, except by serving and filing written objections as described above. Any person who fails to object in the manner prescribed above shall be deemed to have waived such objections and shall be forever barred from raising such objection in this or any other action or proceeding.

ATTORNEYS' FEES AND EXPENSES

Plaintiffs' counsel in the Delaware Actions will jointly apply to the Court at or subsequent to the Hearing for an award of attorneys' fees in the amount of $575,000, plus reimbursement of expenses. Plaintiffs' counsel also intend to apply to the Court of Chancery for provision that any award of attorneys' fees and disbursements with respect to such fee application shall accrue interest at the same interest rate earned by the Settlement Fund through and including the date of payment as more fully described under the heading "The Settlement." Defendants have agreed not to take any position with regard to either application. Any amount awarded by the Court for attorneys' fees and/or disbursements will be paid out of the Settlement Fund of $2.0 million (plus accrued interest) and will accordingly reduce the amount of payments to eligible class members out of the Settlement Fund.

CONDITIONS OF THE SETTLEMENT

The Stipulation provides that the parties have the option to withdraw from the Settlement in the event that (a) the Order and Final Judgment called for in the Stipulation is not entered substantially in the form specified therein (including such modifications thereto as may be ordered by the Court with the consent of the parties), (b) the Settlement is not approved by the Court,

or (c) such order is reversed or substantially modified upon appeal. In addition, the Stipulation provides that defendants have the option to withdraw from the Settlement in the event that there is excluded from the Settlement Class (through the filing of valid Requests for Exclusion) persons who held in excess of that number of MCA common shares which plaintiff and defendants have agreed upon (which number is to be kept confidential by the parties to the Stipulation). In the event any option to withdraw from the Settlement is exercised by any party thereto (as provided for in the Stipulation), or if the Stipulation of Settlement and the Settlement are not approved by the Court or shall not become effective for any reason whatsoever, the Stipulation of Settlement, the Settlement provided therein (including any modification thereto made with the consent of the parties), and any actions taken in connection therewith will be terminated and will become void and have no further force and effect, except for the obligation of MCA to pay for any expenses incurred in connection with this Notice and the administration of the Settlement in the event that the Settlement is not approved.

SCOPE OF THIS NOTICE AND FURTHER INFORMATION

The foregoing description of the Court's Hearing Order, the Delaware Actions, the terms of the Stipulation of Settlement and other matters described herein are only summaries. For the full details of the Delaware Actions, and the terms and conditions of the Settlement, you are referred to the Stipulation of Settlement, the Decision and Order of the Court described herein and the other documents on file with the Court in the Delaware Actions. These documents may be examined by you or your attorney during regular business hours of each business day at the office of the Register in Chancery, Public Building, 11th and King Streets, Wilmington, Delaware 19801.

Questions or communications concerning the Settlement may be directed to the Lead Counsel for the plaintiffs, by contacting Milberg Weiss Bershad Specthrie & Lerach, One

Pennsylvania Plaza, New York, New York 10119-0165, (212) 594-5300.

Dated: Wilmington, Delaware
October 27, 1992

John D. Kelly, III, Register
In Chancery, Court Of Chancery Of The State of Delaware In And For New Castle County

Appendix G

Release Language of the Court Approved Stipulation and Agreement of Compromise of the Delaware Class Action (the "Delaware Settlement"):

1. The Delaware Settlement release provided as follows:

NOW, THEREFORE, IT IS STIPULATED AND AGREED, subject to the approval of this Court, pursuant to Rule 23 of the Court of Chancery Rules, by and between defendants hereto and the plaintiffs for themselves and for the Settlement Class . . . that all claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, and any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class, whether directly, derivatively, representatively or in any other capacity, against any of the named defendants in the Delaware Actions [including the Matsushita Defendants-Appellees] (regardless of whether such defendant has been served or entered an appearance in any of the actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lender, investment bankers, representatives, trustees, affiliates, associates, parents, subsidiaries, general and limited partners and partnership, heirs, executors, administrators, successors, and assigns including without limitation Lazard (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc. (advisor to Matsushita) or against anyone else (collectively, the "Released Persons") in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences referred to in the December 4, 1990, Claim Letter and the Complaint in the Delaware Actions or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions . . . (all of

which are hereinafter collectively referred to as the "Settled Claims"), shall be compromised, settled, released and discharged with prejudice . . . .

A 22-23.

2. The Delaware settlement defined the California Federal Actions as follows:

On December 3, 1990, a putative class action complaint entitled *Epstein v. MCA INC., et al.*, No. CV-90-6451-R, brought on behalf of a class of all shareholders of MCA, was filed in the United States District Court for the Central District of California (the "Federal District Court") (hereinafter, the "*Epstein* Action"). The complaint in the *Epstein* Action, as amended on December 6, 1990, alleged that the arrangements whereby defendant Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding Corp. pursuant to the Capital Contribution Agreement (i) violated SEC Rule 10b-13 because it allegedly entailed a purchase of MCA stock by Matsushita outside the Tender Offer during the Tender Offer period, and (ii) violated SEC Rule 14d-10 because the preferred stock received by Wasserman allegedly was different or greater consideration than that made available to public shareholders in the Tender Offer. The complaint was subsequently amended to include a similar claim under SEC Rules 10b-13 and 14d-10 that a payment to defendant Sheinberg, which defendants asserted was a bonus payment derived from the level of incentive compensation that had been expected to be awarded to Sheinberg in the ordinary course but for the acquisition, allegedly constituted additional consideration for his MCA shares. The complaint sought preliminary and permanent injunctive relief and monetary damages. The *Epstein* Action complaint, as subsequently amended, named as defendants MCA, Matsushita, Matsushita Acquisition, Matsushita Holding, and Wasserman and Sheinberg . . . .

* * *

During December 1990 and January 1991, four purported class actions, brought on behalf of MCA shareholders, were filed in the Federal District Court, entitled *Linder v. MCA INC., et al.*, No. CV-90-6744-KN (filed on December 18, 1990) (the "*Linder* Action"); *Rockford v. MCA INC., et al.*, No. CV-90-6744-JMI (filed on December 18, 1990) (the "*Rockford* Action"); *Karlin, et al. v. MCA INC., et al.*, No. CV-90-6775-R (filed December 18, 1990) (the "*Karlin* Action"); and *Minton v. MCA INC., et al.*, No. CV-91-0336-R (filed on January 17, 1991) (the "*Minton* Action"). The *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action assert substantially similar claims and seek substantially similar relief as the claims asserted and the relief sought in the *Epstein* Action. Unless otherwise indicated, the *Epstein* Action, the *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action—all of which were consolidated by the Federal District Court on April 1, 1991—are collectively referred to herein as the California Federal Actions, and the plaintiffs in the California Federal Actions are hereinafter referred to as the "Federal Plaintiffs" . . . .

A 6-7, 14-15.

3. The Delaware Settlement also expressly stated that these actions were on appeal in this Court. *See* A 17-18.

Appendix H

SEC Rule 14d-10, 17 C.F.R. § 240.14d-10:

§ 240.14d-10 Equal treatment of security holders.

(a) No bidder shall make a tender offer unless:
(1) The tender offer is open to all security holders of the class of securities subject to the tender offer, and
(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

(b) Paragraph (a)(1) of this section shall not:
(1) Affect dissemination under Rule 14d-4 (§ 240.14d-4); or
(2) Prohibit a bidder from making a tender offer excluding all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the bidder to comply with such statute.

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That:
(1) Security holders are afforded equal right to elect among each of the types of consideration offered; and
(2) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

(d) If the offer and sale of securities constituting consideration offered in a tender offer is prohibited by the appropriate authority of a state after a good faith effort by the bidder to register or qualify the offer and sale of such securities in such state:
(1) The bidder may offer security holders in such state an alternative form of consideration; and
(2) Paragraph (c) of this section shall not operate

to require the bidder to offer or pay the alternative form of consideration to security holders in any other state.

(e) This section shall not apply to any tender offer with respect to which the Commission, upon written request or upon its own motion, either unconditionally or on specified terms and conditions, determines that compliance with this section is not necessary or appropriate in the public interest or for the protection of investors.

Appendix I

Section 14(d)(7) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(d)(7):

Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

Appendix J

Pertinent Excerpts From the Stock Purchase Agreement filed with the Securities and Exchange Commission referenced in *Kahn v. Virginia Retirement System*, 783 F. Supp. 266 (E.D. Va. 1992), *aff'd*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994):

STOCK PURCHASE AGREEMENT BETWEEN NORTHERN VENTURES HOLDING CORP., RICHMOND-WASHINGTON COMPANY AND VIRGINIA RETIREMENT SYSTEM (submitted as exhibit to SEC Schedule 14D-1 filed August 30, 1991 by Virginia Retirement System and System Holdings, Inc.)

Shares of Capital Stock of RF&P Corporation
Dated as of August 28, 1991

VRS and System Holdings, Inc, a Virginia corporation ("SHI") and a wholly-owned Subsidiary of VRS, are also entering into an agreement with RF&P pursuant to which SHI intends to offer to purchase all of the outstanding capital stock of RF&P held by all shareholders of RF&P other than VRS and the corporate affiliates of CSXT (the "Offer"). SHI's obligation to consummate the Offer is conditioned upon the satisfaction of all conditions to closing under this Agreement and the Asset Purchase Agreement.

p. 2.

* * *

The obligation of VRS to consummate the transactions contemplated by this Agreement shall be subject, to the extent not waived, to the following conditions . . .

6.9 The Offer. All conditions to the obligations of SHI to commence the Offer and *to accept for payment the shares of capital stock of RF&P pursuant thereto shall have been satisfied or waived and SHI shall have accepted for payment the shares of capital stock validly tendered pursuant to the Offer.*

p. 11-12 (emphasis added).

Supreme Court, U.S.
FILED
MAY 23 1995
CLERK

(3)

No. 94-1809

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD.
AND MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, et al.,

Respondents.

MATSUSHITA ELECTRICAL INDUSTRIAL CO., LTD.
AND MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

WALTER MINTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPSTEIN BRIEF IN OPPOSITION

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38pp

QUESTIONS PRESENTED

Section 14(d)(7) of the 1934 Exchange Act (added by the "Williams Act") and SEC rule 14d-10 promulgated thereunder, the so-called "all-holders, best-price rule", require (unlike Delaware law) shareholder equality "during [a] tender offer." The Ninth Circuit held, *inter alia*, that a special stock arrangement between Matsushita and Lew Wasserman, MCA's chairman and owner of 5 million shares of its common stock, violated that rule. In a series of interlocutory orders, did the court below err in

(i) concluding that the complex and unique Wasserman transaction occurred "during" a tender offer;

(ii) in agreeing with the Second and Third Circuits that section 14(d)(7) created an implied right of action, a point that petitioners had in fact expressly conceded in the court of appeals;

(iii) following limits on settlement authority announced in both the Second and Third Circuits, and then refusing to give preclusive effect to a completely non-adversarial Delaware "settlement" release of causes of action when (a) the sole purpose of the

"settlement" was to extinguish 14d-10 claims in a pending federal appeal, claims over which the federal courts have excusive jurisdiction; and (b) the 14d-10 chim does not overlap (either as to matters of fact or of law) with any of the state law causes of action;

(iv) in refusing to give preclusive effect to a completely non-adversarial Delaware "settlement", the sole purpose of which was to extinguish the 14d-10 claims, in the context of settling state law causes of action that over a year and one half earlier the state court had characterized to be "at best, extremely weak" and in which Delaware petitioners' counsel had characterized the 14d-10 claims as frivolous, and in the context of a settlement that the court acknowledged to give "meager" benefits to the class and in which "suspicion of collusion" abounds?

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INTRODUCTION

This petition arises out of Matsushita Electrical Co. Ltd. and its subsidiaries' ("Matsushita") $6.1 billion dollar acquisition of the common stock of MCA, Inc. ("MCA"). The class complaint charged that Matsushita's public tender offer violated federal securities laws because of (a) a special stock swap arrangement that was provided to Lew Wasserman, MCA's chairman and chief executive officer, and (b), a $21,000,000 bonus paid to Sidney Sheinberg, its chief operating officer and owner of 1,170,000 shares (ER 100:3).[1] These arrangements were alleged to have violated two SEC rules that enforce section 14(d)(7) of the Exchange Act: rule 14d-10, the so-called "all-holders, best-price" requirement, because "during [a] tender offer" Matsushita provided higher consideration to Wasserman and Sheinberg, and "in a tender offer" also offered consideration not open to all stockholders; and rule 10b-13, because they resulted in Matsushita's illegal purchase of shares during the tender offer period (ER 100:2, 17-18). Expressly designed to reject Delaware corporation law, rule 14d-10 prohibits premium payments to favored shareholders "during" a tender offer. Appendix ("App.") 36a n. 31.

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[1] References to "ER" are to the Epstein Plaintiffs' Excerpts of Record, submitted to the U.S. Court of Appeals for the Ninth Circuit. Citations are by docket control number, followed by exhibit number and page number, if appropriate, as follows: "Docket Number: Page Number" or "Docket Number/Exhibit Number: Page Number". Passages within the reporter's transcript are included within the Excerpts of Record and are referred to as "RT" along with the date of the hearing and a citation to the exact number of the page being referenced, as follows: "ER RT Date of Hearing: Page Number."

The district court dismissed both a securities class action ("Epstein") and an individual complaint ("Minton"). In major part, the court of appeals reversed. *Epstein v. MCA, Inc.*, to be reported at 50 F.3d 644 (9th Cir. 1995); App. 1a. On the basis of this Court's intervening decision in *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), the court did affirm dismissal of the Epstein complaint's "aider and abetter" claims against Wasserman and Sheinberg individually. App. 4a n.7. However, the court held that on the undisputed facts the Matsushita/ Wasserman transaction violated 14d-10, App. 11a-20a, and that a jury could so find with respect to a $21,000,000 "bonus" received by Sheinberg. App. 20a-23a. Since 14d-10 could provide all the relief to which plaintiffs are entitled, the court declined to address the 10b-13 claims. App. 3a n.5. The court also held that a Delaware state court "settlement", the sole purpose of which was to release the 14d-10 claims, did not bar the federal action. App. 24a-40a. The court, accordingly, ordered entry of a summary judgment on the Wasserman stock payment and remanded for determination of damages "if any" on that finding; ordered that a class be certified; instructed the district court to consider further amendments to the complaint; and remanded for further proceedings consistent with its opinion. A petition for rehearing (raising precisely the same issues as the petition here) was denied. A suggestion for rehearing *en banc* was rejected, none of the court's 26 active judges having called for a vote. App. 62a.

This petition provides no issue appropriate for this court's review. There is no final judgment, and this court rarely grants review of interlocutory orders. *E.g.*, *Brotherhood of Loc. Fire & Eng. v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967); Stern, *et al.*, *Supreme Court Practice* §4.18 (7th ed. 1993) ("Stern").[2] No reason exists to depart from settled practice here. Further proceedings may moot or reshape some of the issues raised. More important, petitioners will have the opportunity to raise these issues after a final judgment. Finally, none of the claims presented is independently "cert-worthy."

First. The theory of the complaint, sustained by the court below, was that the interlocking of the Wasserman transaction with the public tender offer plainly made the Wasserman transaction part and parcel of the tender offer. Whether the unique and complex Wasserman transaction was "during" and "in" the "tender offer" is a fact-intensive issue whose contours fit this transaction only. No issue of general importance is presented. What is more, wholly apart from the Wasserman holding, a 14d-10 trial would still be necessary because of the court's remand for trial on the "Sheinberg" transaction -- a matter scarcely mentioned in the petition (p. 22, n. 19). App. 23a.

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[2] Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993).

Second. In holding that an implied right of action existed under section 14(d)(7) to enforce rule 14d-10, the court below hewed closely to this court's precedents. The court agreed with recent decisions in the Second and Third Circuits, decisions not even mentioned by petitioners. Moreover, in the court below petitioners affirmatively represented that such a right existed.

Third. In their effort to create a "cert-worthy" issue out of the court's refusal to permit a Delaware settlement to bar this federal action, petitioners egregiously misstate the holding below. The court did not deny preclusive effect to the Delaware proceeding because of some general "'policy' requiring that exclusively federal claims be resolved by settlement only in a federal court" (Pet. at 2). The court said very nearly the opposite. The court was willing to assume that a Delaware release/ judgment would be effective to bar federal claims that were simply counterparts to the state law claims, even though jurisdiction of 1934 Act claims is exclusively in the federal courts. (For example, rule 10b-5 claims have their counterpart in common law fraud.) Following a distinction drawn by Judge Friendly in the Second Circuit and recently recognized in the Third Circuit, the court held, however, that 28 U.S.C. §1738 did not require that preclusive effect be given to a "settlement" of state law claims that also purported to release federal claims, when,

as here, the federal claims do not overlap (in law or in fact) with any of the compromised state causes of action.[3]

The court below thus did not reach respondents' alternative argument: that the Delaware proceeding was constitutionally defective because of the manifestly inadequate class representation. In the context of "settling" state law claims that one year and a half earlier the state court (in rejecting another settlement) had held to be, "at best, extremely weak and, therefore, [of] little or no value", and in the context of a current "settlement" which the court acknowledged provided "meager" benefits and which was enveloped by a "suspicion of collusion", Delaware class representatives purported to release petitioners' potentially "multi-billion dollar liability" (pet. at 25) federal claims they had earlier branded as "frivolous", claims that they had no incentive to and did not protect. A sell out, not a settlement, occurred in Delaware.

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[3] Delaware law does not prohibit premiums to dominant shareholders when they transfer shares that carry with them control of the corporation. Rule 14d-10 was designed to reject that rule, when federally regulated tender offers are the means by which shares are acquired. Petitioners conceded absence of such an overlap in the court below. "Matsushita makes no attempt to argue that any of the Williams Act claims share any predicate in common with the state law claims that formed the basis of the Delaware class action". App. 35a.

REASONS FOR DENYING THE WRIT

A. WASSERMAN TRANSACTION

Petitioners nowhere deny that rule 14d-10, the "all-holders, best-price rule," requires shareholder equality "during [a] tender offer." The court below held that, on the undisputed facts, the Wasserman stock purchase transaction occurred during such an offer. Petitioners assert that this holding conflicts with the Fourth Circuit's decision in *Kahn*[4], which the court below had carefully considered and harmonized. App. 19a. The alleged "conflict" is non-existent, and the claim is designed to mask what the petition really invites: this court's review of the application of settled legal principles to a fact-intensive, complex, and unique set of events. Rare indeed

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[4] *Kahn v. Virginia Retirement System*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1834 (1994). Petitioner's appendix includes documents related to the *Kahn* transaction. These documents were not before any court below. We will, however, not now clutter the record with a motion to strike. Suffice it to say that those documents are not properly part of the record here. *Stern*, *supra*, §12.4.

Even as amplified by these materials entirely outside the record, however, there is no conflict: the "private" purchase in *Kahn* did not tie the price to changes in the tender offer price or give the "private seller" the right to prohibit payment to others until the private purchaser was paid. Finally, even if the court below misunderstood the facts of the *Kahn* transaction (rather than the legal rule) that would raise no issue of general importance. *Certiorari* surely is not appropriate to review not the legal rule but two facts-specific takeover arrangements.

are the occasions in which *certiorari* has issued for such purposes. *Stern*, *supra*, at §4.14. Since no issue of general public importance -- none whatever -- is raised, *certiorari* is inappropriate. *Layne & Bowler Corp. v. Western Wells Works*, 261 U.S. 387, 393 (1923); *Stern*, §4.11.

Petitioners' attempt to inflate the court's ruling on what petitioners themselves acknowledge to be a unique transaction into a fundamental threat to the integrity of the tender offer mechanism is preposterous. Contrary to the claim that the court's decision created uncertainty, it removed it. The opinion makes clear what is included "during [a] tender offer" and what is not. App. 18a-19a. In so doing, the court did no more than apply the doctrine set out in Judge Winter's careful opinion in *Field v. Trump*, 850 F.2d 938, 944 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) (App. 17a-18a), a decision not even mentioned in the petition. Petitioners cite not a single tender offer that would have been or will be threatened by this judgment.

The court's decision was plainly correct on the merits. The structure of the Matsushita-MCA transaction was a transparent violation of rule 14d-10(c). The rule requires that where a tender offerer employs more than one kind of consideration, for example, cash and securities, each shareholder must be allowed the same right to choose among the options offered. That right, in turn, protects the right to receive equal value for one's shares,

and it avoids complex valuation arguments as to whether a particular amount of cash is worth more or less than some new security. Thus, Matsushita could not legally offer Wasserman preferred shares[5] and other shareholders cash. To avoid the rule's prohibition, Matsushita executed an agreement with Wasserman a few minutes before the signing of the public tender offer documents, agreeing to provide the preferred stock in exchange for MCA shares, the side deal to close a few moments after the public had surrendered its shares of MCA, and only if the tender offer attracted sufficient shares. The deal was wholly conditional on the tender offer and its documents: Any delay in the tender offer automatically extended the time for closing the Wasserman deal. Any breach of condition cancelling the tender offer, cancelled the Wasserman offer. If there were any increases in price -- if the hoped-for (by Wasserman) bidding war broke out for MCA (as had happened with Time Warner), and Matsushita raised its price, Wasserman got the benefit. Indeed, Matsushita promised Wasserman it would not pay cash for the shares it had "accepted for payment" from the shareholders, unless and until the Wasserman deal was carried out. And

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[5] To provide equal treatment to other key insiders, Matsushita offered Sheinberg and Geffen the opportunity to receive preferred stock. To provide equal treatment to trusts to which he felt committed, Wasserman offered them the right to get some of his preferred stock if they wanted it. But the ordinary shareholder was not offered this stock. ER 357/Ex. D: 29-30, 39. The reason: it costs Matsushita much more than the $66 a share equivalent to issue and maintain this stock. Supplemental Excerpts of Record of Wasserman and Sheinberg (SER) at 22-23, submitted to the Ninth Circuit.

it gave Wasserman the power to enforce that promise by an injunction. Petitioners concede that the Wasserman transaction was fully conditioned upon the tender offer (Pet. at 22-23). And, of course, all the major "players" understood that Wasserman was part and parcel of the tender offer.[6]

If the Wasserman transaction does not violate rule 14d-10, nothing ever will. Simply by virtue of a lawyer's declaration that the transaction is not part of the offer, transactions will escape the equality requirement of rule 14d-10. Why on earth would the SEC promulgate such a vacuous rule? Petitioners say nothing -- nothing at all -- on that point. The court below, quoting the SEC, rightly recognized that 14d-10 embodied a substantive policy and

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[6] Discovery confirmed what was apparent on the face of the documents: all the "players" (the principals, their investment advisors, and the lawyers) understood that the Wasserman transaction was part of the tender offer. For example, MCA board member and investment banker Felix Rohatyn testified:

> "Q. Did you consider MEI's (Matsushita's) acquisition of Mr. Wasserman's stock to be part of MEI's acquisition of MCA?
>
> "A. Yes, I did."

(ER 357/Ex. A: 33-34). MCA's counsel Martin Lipton also represented Wasserman and Sheinberg. He gave precisely the same account (ER 357/Ex. X: 4-5, 104-05). Lipton advised the MCA board that it could consider, *inter alia*, "the fact that the two largest shareholders of the Company have stated their willingness to tender to MEI" (ER 357/Ex. D: 60) (emphasis added).

was not intended to amount to no more than a drafting exercise for first year associates. App. 15a-16a.

Petitioners assert (Pet. at 4, 22) that the court below overlooked a stipulation that "the Wasserman transaction was entered into when no tender offer was pending" (Pet. at 4). No such stipulation appears in the pages (App. 49a-50a) to which reference is made. That reference is to part of the "findings" made by the district court, part of a set submitted by the petitioners' counsel which the court simply signed with only two trivial changes. (App. 45a). The terms of the stipulation finally appear in a footnote. (Pet. at 22 n. 20.) And what appears?: a stipulation as to what points on a clock certain events occurred, a time sequence which the court of appeals fully understood. This hardly constitutes a stipulation that "the Wasserman transaction was entered into when no tender offer was pending". Moreover, even if the court had misunderstood the stipulation that would provide no basis for *certiorari*. *Certiorari* is not used to supervise appellate court understanding of fact-specific stipulations.

Finally, we observe that, unless the slim footnote reference in the petition at p. 22, n. 19 suffices, the petition makes no challenge to the remand for factual trial on Sheinberg. The court held that a jury might find that a $21,000,000 bonus paid to MCA's CEO was made to secure his adherence to the transaction and to tender his shares. App. 20a-23a. Thus, the 14d-10 issue would remain in the case no matter what this Court held.

B. IMPLIED RIGHT OF ACTION

Petitioners' implied right of action analysis rests upon three mischaracterizations: their own position; the court of appeal's analysis; and finally, this Court's precedents.

Wasserman and Sheinberg argued on appeal that no private right of action existed under section 14(d)(7), and thus that rule 14d-10 could not be enforced by private action.[7] By contrast, petitioners expressly conceded the existence of an implied right of action. In petitioners' merits brief (p. 47) they said

> "The Epstein Plaintiffs' concession that there is no need to attempt to demonstrate the existence of a private right of action under Rule 10b-13, because Rule 14d-10 already provides plaintiffs with full protection, *see* Epstein Br. at 53, undercuts any argument that a private right of action *must* be created under Rule 10b-13 to safeguard the interests of tendering shareholders. In addition to SEC enforcement actions and Rule 14d-10 claims, stockholders are further protected by Rule 10b-5, ..."

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[7] As indicated, p. 2, *supra*, the judgment in their favor was affirmed on another ground.

Petitioners have spent a good deal of energy attempting to extricate themselves from the representation that rule 14d-10 claims provide shareholders adequate remedies for breaches of the equal treatment requirement. The Ninth Circuit gave petitioners the "benefit of the doubt", and permitted them to make the argument, pointing, however, only to a document submitted long after the oral arguments on the merits. App. 5a n. 9. This Court is under no similar obligation to accommodate petitioners' effort.[8]

Even if petitioners had standing to challenge the existence of an implied right of action, their challenge is meritless. The court below fully understood that whether an implied right of action exists is a question of legislative intent. App. 7a.[9] Indeed, the court pointed out that two recent Ninth Circuit cases had been overruled for failure to recognize that.[10] *Ibid.* The court engaged in a careful analysis of the language and structure of the section 14(d)(7), which is uniquely clear in its intent: an offeror "shall pay". App. 7a-11a. We need not restate the analysis. The court's conclusion was in complete accord

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[8] The existence of an implied right of action, *vel non*, is not jurisdictional. *Northwest Airlines, Inc. v. County of Kent*, 114 S.Ct. 855, 862 (1994).

[9] The court said that the relevant inquiry was "whether there is an implicit indication, in the statute's language, legislative history, or structure, of legislative intent to create a private remedy, and whether such an implication would be consistent with the underlying legislative scheme." App. 7a.

[10] *Ibid.*

with earlier decisions by the Second Circuit (authored by Judge Winter) and the Third Circuit (authored by Judge Becker). *Field v. Trump*, 850 F.2d 938, 946 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Polaroid Corp. v. Disney*, 862 F.2d 987, 996 (3d Cir. 1988). See also *Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.), *cert. denied*, 479 U.S. 954 (1986) (§14(d)(6) contains private right of action). "Matsushita argues that we should not follow Pryor, Field, and Polaroid", the court observed. App. 7a. Interestingly, in their petition to this court, petitioners make no reference whatsoever to those decisions.[11] Nor do they note that two other federal circuits have recognized, by implication, that rule 14d-10 is enforceable in a private action. See *Kahn v. Virginia*,

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[11] In their motions for rehearing and for a stay on the mandate, petitioners vigorously asserted that the court erred in considering the "context" in which the Williams Act was enacted in determining legislative intent. Petitioners have now demoted the argument to a footnote. Pet. at 18-19 n. 15. Rightly so, because the contention is obviously meritless. First, context was only one factor which the court considered in determining legislative intent, and it was the last. Only after the court considered the language and structure of section 14(d)(7), 50 F.3d 644 (9th Cir. 1995), did the court say "Finally, the legal context . . ." App. 9a. Even if context could never be considered, the previous factors relied upon by the court would justify a private right of action. Moreover, the context in which a statute is enacted is a relevant factor in determining legislative intent. See the discussion at App. 7a and the decisions cited at note 14 of the court's opinion. App. 10a-11a. Even Justice Scalia, no fan of implied rights of action, is not on record as opposed to that position. Writing for himself alone in *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) he urged the courts to "get out of the business of implied rights of action altogether" with respect to newly enacted legislation.

supra, and *Priddy v. Edelman*, 679 F. Supp. 1425 (E.D. Mich. 1988), *aff'd on other grounds*, 883 F.2d 438 (6th Cir. 1989).

Petitioners also observe that 14d-10 comes 18 years after section 14(d)(7), and apparently for that reason this rule should not be federally enforced. Pet. at 3, 19. This argument was never advanced by any litigant in the court below. Wasserman and Sheinberg argued that section 14(d)(7) did not create a private right of action, but they clearly assumed that if it did, rule 14d-10 could be enforced. Br. 54-58.[12] Even if these petitioners had raised their newly minted argument, it is meritless. All SEC rules come some time after the statute that authorizes them. Rule 14d-10 is an integral part of section 14(d)(7) policy, and it is a rule carefully designed to prevent precisely the kind of abuse shown here. The statute, not the rule, creates the right of action. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1101 (1991); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338-39 (4th Cir. 1995). If the claim is that 14d-10 is unauthorized ("goes well beyond" section 14(d)(7)) (Pet. at 18), that issue also was never raised by any litigant below, and it too is meritless. The Third Circuit expressly held in *Polaroid*, and the Fourth clearly assumed in *Kahn*, that 14d-10 claims could be maintained under section 14(d)(7).

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[12] As the court below put it, "Matsushita makes the threshold argument that it cannot be sued by MCA shareholders for violating rule 14d-10 because Congress did not intend sections 14(d)(6) and 14(d)(7) to be privately enforceable. App. 5a.

Petitioners seek to nullify completely the equality requirement of 14d-10. If petitioners' view of the law were correct, offerors could pay any amount to favored shareholders so long as they can escape SEC detection. Moreover, as the court below noted, the Williams Act has no separate SEC enforcement mechanism.

C. DELAWARE

Petitioners argue that the court's refusal to give preclusive effect to the Delaware settlement judgment conflicts with the First Circuit's decision in *Nottingham Partners*, and the Third Circuit's decision in *Grimes*.[13] This is false. No conflict exists. In the class action context, no court has ever held that preclusive effect need be given when the state law claims settled did not overlap in fact or law with the federal claims. In declining to do so, the court's decision relied upon the distinction drawn by Judge Friendly's opinion in *National SuperSpuds*[14], a distinction squarely endorsed by the Third Circuit in *Grimes*. 17 F.3d at 1564.

We first discuss the Delaware proceedings. Next we address petitioners' attempt to misstate the issue here: its effort to convince this court that this petition presents

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[13] *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991), and *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1564 (3d Cir.), *cert. denied*, 115 S.Ct. 480 (1984).

[14] *National SuperSpuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981).

the general question of the power of state courts to release federal claims within the exclusive jurisdiction of the federal courts but which substantially overlap with the state law causes of action. Finally, we turn to what the court below actually decided.

1. The Delaware Proceeding

What is striking about petitioners' discussion of the Delaware proceedings is they say nothing about what actually happened. The reason will soon be apparent.

When the financial press in September 1990 announced that a tender offer by MCA was in the making, a class action was immediately filed in the state court. Petitioners were *not* named as parties defendant. The Delaware complaint alleged only Delaware causes of action, because jurisdiction over claims under the 1934 Act is exclusively in the federal court. 15 U.S.C. §27. On December 2, after the tender offers' terms became public, this class action was filed, and at that point the Delaware proceeding became active; by December 11 a settlement "in principle" had been announced. App. 24a-25a. The notice of settlement stated that settlement talks had in fact begun "on or before the day the complaint was filed", even though the full terms of the tender offer would not be known for two months.[15]

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[15] The complaint was filed on September 30, 1990. The full terms of the tender offer became known on November 30, when required documents were filed with the SEC.

The first proposed settlement would have released federal as well as the state law claims. Though petitioners do not so much as mention it (see pet. p. 5, n. 2), in April 1991, the vice chancellor rejected the settlement as "illusionary," recognizing it to be no more than a lawyer's relief bill. *In re MCA, Inc. Shareholder Litig.*, 598 A.2d 687, 695-96 (Del. Ch. 1991). Pointedly, he characterized the Delaware law claims as "at best, extremely weak and, therefore, have little or no value." *Id.* at 694. He said that only the claims before the district court had substance. *Id.* at 695. No Delaware class was certified.

For the next year and a half <u>all</u> the litigation occurred in the federal court.[16] There were no Delaware litigation docket entries. Significantly, however, during this period, no defendant moved to dismiss the state complaint.

After an appeal had been taken to the court of appeals, <u>and after plaintiffs' brief on the merits had been filed</u>, a second run to Delaware was made: these petitioners tried to use Delaware as a forum to quash the

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[16] Here is how petitioners' counsel characterized the on-going Delaware proceedings to Judge Real, in September 1991, a full five months after rejection of the initial settlement.

> "I think it's fair to say it ceased to be prosecuted because the Delaware judge said there was no basis for the state law claims . . . *The Delaware action is not being prosecuted in any way*".
>
> ER RT 9/03/91: 8-9.

federal appeal. Petitioners announced another proposed settlement class and another proposed settlement. Their hope, no doubt, was that respondents would feel compelled to appear in Delaware, and by virtue of submitting to Delaware's jurisdiction, convert an exclusively federal case into one that could be settled with other, more pliable, counsel, counsel who had already fomented one "illusionary" settlement. Believing it inconceivable that the courts of the United States would permit their properly invoked jurisdiction to be destroyed by such strategies, respondents held to their federal forum. They did not appear.

Petitioners again say nothing of the court's response to the new settlement. The vice chancellor did approve the settlement. But he stated that its benefits were "meager" and acknowledged that "suspicions abound" of collusion. "Suspicion, however, is not enough and the objectors have offered no evidence of any collusion." App. 70a. His unease was further reflected in his order reducing counsel fees.[17] For reasons that perplexed the Ninth Circuit (App. 27a), the vice chancellor treated the federal claims as worthless, even though that issue was on appeal to the Ninth Circuit and review in that court was *de novo*. A three-member panel of the state supreme court summarily affirmed without opinion. App. 76a.

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[17] Even though they presumably had done more work since the first settlement failed, Delaware counsel had sought less as counsel fees.

The state settlement, of course, had one purpose only: to destroy the class action aspects of the 14d-10 claim. There was no provision for opting out a federal class; defendants expecting that few -- if any -- individual opt-outs would occur. Delaware class counsel had no incentive whatever to protect the 14d-10 claims of the class, and they did not. Quite the contrary; he affirmatively disparaged them. They were, he had earlier said, "frivolous"[18] (App. 26a). Delaware counsel never asked for a copy of our merits brief in the Ninth Circuit, nor did he make any effort to ascertain the contents of the thousands of pages of Japanese documents we had translated. We could go on. We could show that the Delaware brief supporting settlement misrepresented federal law.[19] So too did the notice issued to

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[18] "We concluded that any 10b-13, 14d-7 claim was frivolous, should not be pursued, would be distracting in the main litigation, and would be a waste of our time and resources when we had a big battle with defendants underway on the issues of Delaware law." Ex. E. p. 16 of Declaration of Counsel (DC) containing documents relevant to the Delaware proceedings and submitted to the Ninth Circuit.

[19] For example, the Delaware counsel incredibly suggested that even if the Ninth Circuit reversed on the class action issue, class members *still* would not recover:

> As significantly, if not more so, the federal plaintiffs in California sought class certification. This was twice fully and finally denied by Judge Real on all Rule 23 criteria. There is no class in the so-called "federal class actions." Thus, absent class members cannot, in the present posture or in any posture that I can envision, have any benefit

shareholders.[20] The "representation" was, in a word,

> from that proceeding. The persons who might benefit, if at all, if a number of remote scenarios took place, would be the individual plaintiffs, and even there they must obtain a reversal of their decisions in that court. But the fundamental fact is that class certification has been denied, and for the many thousands of MCA shareholders, all of whom have elected not to opt out, other than the few who have opted out, there is no prospect of recovery in that case because it's not a class action. And one must question at this time whether or not the statute of limitations has expired...

Transcript of Jan. 21, 1993 hearing (DC Ex. I:9-10). As another illustration consider counsel's skeptical treatment of defendant's prospects for damages. Thus, the Delaware Court was told "it is doubtful that the Ninth Circuit will overturn the Federal District Court's factual finding that Mr. Wasserman did not receive higher consideration...". DC Ex. N:32. Yet in the district court petitioners had not moved for summary judgment on damages; and they had already filed its briefs in the appeal to the Ninth Circuit, a brief which made no effort to defend the "finding."

[20] The Second Notice of Settlement was sent to the class by document dated October 27, 1992. App. 77a-101a. The story of the litigation was told in a nearly incomprehensible manner. The document was clearly false in its statements about shareholder rights in the event a shareholder opted out. The notice (App. 96a) states

> "By filing a valid Request for Exclusion, a member of the Settlement Class *will not be precluded by the Settlement from individually seeking to pursue the claims* alleged in the Delaware Actions, the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action, or any other claim relating to the events at

constitutionally inadequate as a matter of law, and certainly could be so demonstrated as a matter of fact.[21]

A *sell out, not a settlement, occurred* in Delaware. The Delaware plaintiffs knew that they had had no state claims to compromise, and they were very happy to barter away claims they could not litigate, or in any way affect through issue preclusion. Their release of the 14d-10 claim came at no cost to themselves. App. 39a. In exchange for a "settlement" that would pay each shareholder the munificent sum of two to three cents a share (before subtracting counsel fees), Delaware counsel purported to release federal claims that, according to the petitioners (Pet. at 25), are multibillion dollar claims.[22]

> issue in the Delaware Actions."

DC Ex. H:12 (emphasis added). To succeed in federal court, the document informs that one must "individually pursue" one's claims. Your choices are settle or file your own lawsuit. The truth is, however, one could have declined participation and await adjudication of the status of the federal class.

[21] As noted, respondents did not appear in Delaware. Since *Hansberry v. Lee*, 311 U.S. 32 (1940), it has been clear that a collateral attack on inadequate representation is proper in these circumstances. The right to opt-out does not substitute for the requirement of adequate representation. The latter is an additional right secured by the due process claims. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

[22] We note that petitioners were fully on notice that their settlement efforts were subject to Ninth Circuit proceedings before they paid any consideration.

Defendants, of course, had every interest in cooperating in such a "settlement." This explains why, for example, they did not move to dismiss, and why no information exists as to who the Delaware plaintiffs are, even though Delaware law requires it. *Prezant v. De Angelis*, 636 A.2d 915, 923-26 (Del. Supr. 1994). The Delaware "settlement" is an egregious example of the abuses in "settlement" class actions that Judge Becker has recently described in the General Motors case.[23]

The nature of the state court proceedings in this litigation is highly unusual. Any legal question concerning power of state courts to release exclusively federal class action claims does not come in a clear-cut manner; it is contaminated by the effort here to remove a pending federal appeal into a state forum by resuscitating a state case already determined to be meritless. The issue, moreover, is fact intensive, inextricably intertwined with the claim of inadequate representation by counsel, and of constitutionally insufficient supervision of the settlement process by the vice chancellor. App. 39a.

2. State Court Releases

While fully aware of our challenge to the collusive character of the Delaware "settlement," the Ninth Circuit did not rest its decision on that ground. Rather, the court

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[23] *In Re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, __ F.3d ___, 1995 U.S. App. LEXIS 8815 at *44-45, 82 (3d Cir. April 17, 1995).

held that the Delaware judgment was not preclusive on another basis. That court began by distinguishing between ordinary litigation and class actions, and the court recognized that it was dealing with "nontraditional forms of litigation,...class action[s]." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 402 (1980). Accordingly, "the settlement of a class action is fundamentally different from the settlement of traditional litigation". App. 38a. Class actions are representative suits. *Hansberry v. Lee, supra*, 311 U.S. 32, 41 (1940).[24] In a true representative suit, the representative bound all the members of its class.

Whatever the power of a representative to affect claims within the exclusive jurisdiction of the federal court, an issue on which this Court has never ruled,[25] no

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[24] The immediate ancestor of the modern representative suit is the Chancery court's insistence on joinder of all parties who are interested in an action. *See* Fed. R. Civ. P. 19, which embodies that insistence. When as a practical matter joinder could not be achieved because the parties were too numerous, Chancery developed the practice of authorizing representatives to sue. 1 Newberg and Conte, *Newberg on Class Actions* §1.09. pp. 1-24 to 1-26 (3d ed. 1992). "The class action suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested...is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable." *Hansberry v. Lee, supra*, at 41. *See, also, Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363 (1921).

[25] Petitioners state that "[t]his Court has held in a series of cases from *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), to *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), that certain federal statutes which confer exclusive federal jurisdiction do

court had ever held that a representative's release of claims that could not have been adjudicated was effective when the state law causes of action did not overlap, either in fact or in law, with the federal cause of action.

Nottingham Partners and *Grimes*, *supra*, are not to the contrary, as the court below recognized. App. 32a-35a. Although in a fact unnecessary to the decision in either case, [26] each court was willing to sustain state court releases of claims under the Exchange Act, but only in the context of claims that substantially overlapped with the federal claim. This is the usual situation. Rule 10b-5 claims, for example, are largely federal law counterparts of state common law fraud. In those circumstances, litigation of the state law claim *might* have issue preclusive

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not create an exception to Section 1738." (Pet. at 8.) This statement is false. *Kremer* in fact left open the issue of whether Title VII jurisdiction was exclusively in federal court. See P. Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System*, 1627 n.2. (3d ed. 1988). *Parsons* is so remote as not to warrant comment. The only decision of this Court to discuss the impact of §1738 on cases within the exclusive jurisdiction of the federal district court is *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), which specifically leaves the issue open. *Id* at 386. *See generally*, *Hart & Wechsler* at 1627-28. Moreover, none of these cases involved a class action.

[26] In both cases and unlike here, the litigants had appeared in the state proceedings, made that challenge, lost, and sought to relitigate in federal court. That is wholly improper under 28 U.S.C. §1738, even if the second challenge is reframed as a "jurisdictional" one. *Durfee v. Duke*, 375 U.S. 106, 112-16 (1963). Moreover, in both cases, both state court proceedings were sharply adversarial.

effect with respect to a "copy-cat" federal claim. There is an argument that what could be litigated or affected by litigation could be settled. The court of appeals assumed *arguendo* that this was so, even though it was aware that eminent commentators had strongly attacked the practice, a threat to federal securities policy. In exchange for settlement of weak state law claims, Delaware counsel could compromise substantial federal ones, claims over which the courts of the United States had been given exclusive jurisdiction. If that effort to oust federal jurisdiction became prevalent, "the well-travelled road to the Delaware courts could become a six lane highway." John C. Coffee, Jr., *Suspect Settlements in Securities Litigation*, *New York Law Journal*, March 28, 1991, at 5, col. 1 (DC Ex. M:1). Professor Coffee adds:

> "While the legal issue of when one court has the power to approve the release of claims pending in another forum is complex, the practical message to plaintiffs' counsel is much simpler: weak derivative and class action claims that once would have been routinely dismissed by the Delaware Chancery Court now have an enhanced settlement value, because they can confer immunity with respect to pending federal securities class actions, which often would have a significant settlement value.

"Ironically, the incentives for defendants are even clearer: never seek dismissal on the merits of a state class action if a companion federal class action raising related federal claims is possible, but instead reach a settlement in which the defendants are given a general release.

* * *

"This type of settlement can be described as "collusive" because the parties to the state court settlement are effectively depriving absent players -- the plaintiffs and their attorneys in the federal action -- on their day in court."

3. The Actual Holding

But the court of appeals thought it unnecessary to consider the general issue of state court releases of exclusively federal claims because this is not a "copy-cat" case.[27] Relying directly upon Judge Friendly's opinion in "SuperSpuds," Judge Norris distinguished such cases from those in which no overlap exists (in fact or in law) between the federal and state causes of action. He wrote:

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[27] And, as we have noted, the court had no need to address the inadequacy of the Delaware representatives.

The very cases Matsushita relies upon counsel against an expansive state court power to release exclusively federal claims. In applying an issue preclusion test rather than a "same transaction" test, the cases embrace Judge Friendly's common sense reasoning that a court's jurisdiction to extinguish claims by class settlement should not exceed its jurisdiction to extinguish claims by adjudication. Ignoring this reasoning, Matsushita asks us to impose a "same transaction" test without offering logic or precedent in support of such a test. [The "arising out of the same transaction" test is, of course, used in claim preclusion doctrine. See Restatement (Second) of Judgments § 24 (1981). However, Matsushita, as it must, expressly disclaims reliance on claim preclusion. See *Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir. 1975) (state court judgment can have no claim preclusive effect on exclusively federal securities claims).]

App. 34a. Judge Norris' opinion was in fact in complete accord not only with Judge Friendly's opinion, but with that of the Third Circuit in *Grimes v. Vitalink Communications Corp.*, *supra*, upon which petitioners rely

for their "conflict" claim.[28] The Third Circuit too relied upon the very same distinction, citing *SuperSpuds* as for the proposition that "a state court class representative cannot release federal claims arising from a different factual predicate than that before the court." *Id.* at 1564. No contrary class action authority exists.[29]

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[28] The wholly unsubstantiated claim that prior tender offers are now subject to wholesale challenge is a claim too removed from reality to warrant any comment. On reopening judgments for money damages, see *Plaut v. Spendthrift Farms*, ___ S.Ct. ___, 131 L.Ed. 2d 328 (April 18, 1995).

[29] Judge Norris went on to demonstrate, and petitioners do not dispute, that the federal claims extinguished by the Delaware judgment could not have been extinguished by the issue preclusive effect of an adjudication of the state claims. See p. 5, n. 3.

CONCLUSION

The petition should be denied. Nothing more is presented than an application for review of a fact-intensive set of interlocutory orders respecting a unique, complex and indisputably illegal transaction tailored to the needs of one person.

Date: May 22, 1995

Respectfully submitted,

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No. 94-1809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINTON OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPPOSITION OF WALTER MINTON TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Walter Minton respectfully submits the following opposition to the Petition of Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corporation ("Matsushita") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

ADDITIONAL PERTINENT STATUTORY AND REGULATORY PROVISIONS

Section 14(d)(7) of the Williams Act (15 U.S.C. § 78n(d)(7)) provides:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request for invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

SEC Rule 14d-10(c)(1) provides in pertinent part:

> Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That: (1) Security holders are afforded equal right to elect among each of the types of consideration offered[.]

SEC Rule 14d-2 (17 CFR section 240.14d-2) provides in pertinent part:

> (a) A tender offer shall commence for the purposes of Section 14(d) of the Act and the Rules at 12:01 a.m. on the date when the first of the following events occurred:
>
> ...
>
> (5) The tender offer is first published or sent or given to security holders by the bidder by any means not otherwise referred to [in the preceding paragraphs].
>
> (b) *Public Announcement.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section with respect to the tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 shall be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section
>
> ...
>
> (ii) Notwithstanding paragraph (b)(2)(i) of this section, section 14(d)(7) of the Act shall be deemed to apply to such tender offer from the date of such public announcement.

QUESTIONS PRESENTED

Section 14(d)(7) of the Williams Act (15 U.S.C. § 78n(d)(7)) and SEC Rule 14d-10 promulgated thereunder embody the "all holders, best price" rules of the securities laws and require a tender offeror to treat all target shareholders equally.

Matsushita has filed this petition because the court below held that Matsushita, as part of its 1990 acquisition of MCA Inc., violated section 14(d)(7) and Rule 14d-10 by giving Lew Wasserman, MCA's chairman and owner of 5 million shares of its

common stock, a special stock payment designed to save him over $100 million in income taxes, and will have violated these rules if a jury finds that Sidney Sheinberg, MCA's President, received a $21 million premium for his stock.

Matsushita's Petition presents the following issues:

1. Whether the Ninth Circuit was correct in applying the implied private right analysis approved by this Court and concluding, with the Second and Third Circuit Courts of Appeals, that there is a private right of action for the violation of section 14(d)(7) and Rule 14d-10.

2. Whether the Ninth Circuit was correct in applying a substantive analysis in determining that the Wasserman transaction was part of Matsushita's tender offer and therefore subject to section 14(d)(7) and Rule 14d-10 and in rejecting Matsushita's claim that it can avoid the proscriptions of section 14(d)(7) and Rule 14d-10, even though the Wasserman transaction was entered into after the tender offer commenced, merely by labeling the Wasserman transaction as "private."

3. Whether the Ninth Circuit properly refused to give preclusive effect to a collusive settlement agreement entered into in a dormant Delaware state court class action that purported to release the exclusively federal section 14(d)(7) and Rule 14d-10 claims, where the facts underlying such claims were not and could not be litigated in the state court action, and where a litigated judgment in the state court action would not have had any preclusive effect on such exclusively federal claims.

STATEMENT OF THE CASE

This case arises out of the acquisition of MCA Inc. in late 1990 by Matsushita Electric Industrial Co., Ltd. and its subsidiaries ("Matsushita") for consideration of over $6 billion.[1]

Under the formal terms of its tender offer, Matsushita offered $66 per share in cash to every shareholder except Lew Wasserman, the chairman and owner of approximately 5 million shares of MCA common stock. In return for Wasserman's backing of their tender offer, Matsushita entered into a special agreement with Wasserman, under the terms of which Wasserman exchanged his MCA stock for preferred stock in a Matsushita subsidiary (the "Wasserman transaction"). The Wasserman transaction was structured to be a tax-free transaction that would provide Wasserman with *at least* equivalent value for his shares and would also allow Wasserman to avoid ever paying over $113 million in income taxes.[2]

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[1] Matsushita Acquisition and Matsushita Holding are Delaware corporations formed by Matsushita Electric Industrial Co., Ltd., a Japanese corporation ("MEI"), for the purpose of making a tender offer for the common stock of MCA. The Merger Agreement between MEI and MCA provided that Matsushita Acquisition would make a cash tender offer for the outstanding shares of common stock of MCA and that thereafter Matsushita Acquisition would merge with and into MCA. Upon the completion of the tender offer, Matsushita Acquisition was merged with and into MCA. MCA continues as the surviving corporation and is a wholly-owned subsidiary of MEI. Thus, while pre-merger MCA is not in the case as an aider and abetter (see footnote 6, *infra)*, post-merger MCA is the successor-in-interest to the liabilities of the primary wrongdoer, Matsushita Acquisition.

[2]Wasserman's basis in his 4,953,927 shares of common stock was only 3¢ per share. (Matsushita Appendix (hereinafter "App.") 2a.) Thus, if he had received the $66 in cash per share that the other MCA shareholders received, he would have had a taxable gain of $326,810,564 ($65.97 basis per share * 4,953,927 shares). The maximum federal income tax rate for capital gains in 1990 was 28%. Wasserman lived in California, and in 1990, California's maximum income tax rate for capital gains was 9.3%. Taking into account the deductibility of state income taxes for federal income tax purposes, the combined effective income tax rate was 34.7%. Thus, had Wasserman received cash, he would have had to pay taxes of $113,403,266 ($326,810,564 gain * 34.7% tax rate).

Matsushita publicly announced its tender offer for MCA on the morning of November 26, 1990.[3] The Wasserman transaction was entered into at the earliest ***after*** 12:01 a.m. on November 26, 1990. (App. 12a.)

Matsushita has admitted that it did not offer the preferred stock to all holders of MCA common stock.

In their complaints, Minton, individually ("Minton"), and the Epstein Plaintiffs, as putative class representatives ("Epstein"), alleged that the Wasserman transaction violated section 14(d)(7) of the Williams Act, Rule 14d-10 promulgated thereunder, and Rule 10b-13 because Matsushita, through the Wasserman transaction, varied the tender offer by increasing the consideration offered to Wasserman without paying such increased consideration to the other shareholders.[4] After denying the Epstein Plaintiffs' motion for class certification, the district court entered summary judgment

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The preferred stock Wasserman received pays a dividend of 8.75% annually, is secured by letters of credit, and is redeemable upon the death of the earlier of Wasserman or his wife, and in no event earlier than five years from the date of the exchange. (App. 2a.)

It is undisputed that the transaction was designed to be a tax-free exchange of Wasserman's MCA stock under Internal Revenue Code § 351(a). (*Id.*) Since, upon the death of Wasserman or his wife, the basis of all their community property, including the Matsushita preferred stock, would "step up" to its fair market value (see Internal Revenue Code §§ 1014, 2032), ***if Wasserman holds his preferred stock until he or his wife dies, he can avoid paying over $113 million in income taxes.***

[3]Consolidated Clerk's Transcript, 177, page 5.

[4]Plaintiffs also contended that a $21 million payment made to Sidney Sheinberg, MCA's president and owner of 1,170,000 shares of MCA common stock, was in reality additional consideration paid to him in return for his promise to tender his stock.

in favor of Matsushita in both the Epstein Action and in the Minton Action.[5]

The Ninth Circuit reversed the dismissal of the section 14(d)(7) and Rule 14d-10 claims, holding that the Wasserman transaction violated Rule 14d-10 as a matter of law, and remanded on the question of damages. (App. 20a.) The court also ruled that the jury could find that the $21 million payment to Sheinberg was part of Matsushita's tender offer and therefore violated Rule 14d-10, and remanded on that issue. (App. 23a.)[6]

With respect to the class action issues, the court vacated the order denying the motion for certification and instructed the district court on remand to enter an order certifying the class. (App. 43a.) The court also rejected Matsushita's claim that an intervening settlement of a Delaware state court class action that purported to release the federal claims in this case barred the class action because the Delaware claims depended on different underlying facts than the federal claims.[7]

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[5]The district court had previously dismissed Plaintiffs' Rule 10b-13 claims on the grounds that there was no private right of action thereunder. The Ninth Circuit declined to consider this claim, reasoning that, on the facts of this case, any relief Plaintiffs could obtain under Rule 10b-13 was also available under Rule 14d-10. (App. 3a, fn. 5.)

[6]On the authority of this Court's decision in *Central Bank v. Interstate Bank*, 114 S.Ct. 1439 (1994), the Ninth Circuit affirmed the dismissal of the "aider and abetter" claims against the pre-merger MCA, Wasserman and Sheinberg. (App. 4a, fn. 7.)

[7] The court specifically declined to decide whether a state court may release exclusively federal claims in a class action settlement judgment when those claims depend on the same facts as state law claims before the court. (App. 40a, fn. 34.)

REASONS FOR DENYING THE PETITION

1. ***There is no final judgment***. This case does not involve a final judgment, but an interlocutory ruling by the Ninth Circuit. It is quite possible the future proceedings will result in the issues raised by Matsushita becoming moot. For example, Matsushita has always contended that the consideration Wasserman received pursuant to the Wasserman transaction was not worth more than the $66 in cash paid to the other shareholders. While Plaintiffs dispute this contention, this issue will ultimately be determined by a jury. If a jury agrees with Matsushita's contentions, then there will be no need for this Court to determine the issues Matsushita raises now.

2. ***The Wasserman Transaction Was a Unique Transaction***. Matsushita admits in its Petition that the Wasserman transaction "was intended to satisfy Mr. Wasserman's *unique* tax planning and estate need arising in part from his age (77 in 1990) and his extremely low basis in the MCA stock ($.03 per share)." (Petition, 4 (emphasis added).) The Ninth Circuit's finding that the Wasserman transaction was part of Matsushita's tender offer was necessarily based on the unique facts of the Wasserman transaction.[8] Thus, a review of such finding by this Court will not result in any needed clarification of principles applicable to normal tender offers.

3. ***Private Right of Action***. Although Matsushita requests this Court to determine whether there is a private right of action under Rule 14d-10, such determination is unnecessary because Matsushita cannot credibly dispute that there is a private right of action under section 14(d)(7). The Ninth Circuit's recognition of a private right of action under section 14(d)(7) is consistent with this Court's jurisprudence and with every Circuit Court that has specifically addressed the issue. Since Matsushita violated both Rule 14d-10 and section 14(d)(7), whether there is a private right of action

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[8]See App. 11a-13a and 18a-20a for discussion of Wasserman transaction.

under Rule 14d-10 in addition to section 14(d)(7) is essentially moot.

Moreover, contrary to Matsushita's contention, the court below did not "automatically" imply a private right of action for every rule adopted pursuant to section 14(d)(7). Indeed, in recognizing a private right of action under Rule 14d-10, the Court of Appeal cited its decision in *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530 (9th Cir. 1984), wherein it specifically adopted the two-step inquiry referred to by Matsushita in its Petition to determine whether there is an implied right of action under an agency rule. Thus, there is not a case where the Ninth Circuit is adopting a "new implied right of action test of unprecedented breadth." (Petition, 19.)

4. ***Construction of "Best Price" Rules***. Contrary to Matsushita's claim, the Ninth Circuit did not "expand" a statutorily-defined tender offer time period to include a transaction that occurred outside the tender offer period. (Petition, page i.) In fact, based on the stipulated facts, there is no question that the Wasserman transaction was entered into ***after*** the tender offer commenced. This finding is consistent with the Fourth Circuit's interpretation of Rule 14d-10 in *Kahn v. Virginia Retirement Systems*, 13 F.3d 110 (4th Cir. 1993) *cert. denied*, 114 S.Ct. 1834 (1994).

In addition, the Ninth Circuit's refusal to be bound by the label used by Matsushita and its adoption of a substantive analysis of the Wasserman transaction to determine whether it should be deemed part of Matsushita's tender offer for purposes of section 14(d)(7) and Rule 14d-10 is consistent with Second Circuit's decision in *Field v. Trump*, 850 F.2d 938, 942 (2d Cir. 1988) *cert. denied.*, 489 U.S. 1012 (1988). Following the analysis of the Second Circuit in *Field*, the court below properly held that a tender offeror should not be allowed to pay higher consideration to a favored shareholder through a transaction that was an integral part of, and entered into during, the formal tender offer, and avoid the "best price" rule of section 14(d)(7) and Rule 14d-10 merely by

structuring and labeling the discriminatory transaction as an ostensibly "private" transaction.

5. ***Class Action Issues***. The Court of Appeals' decision with respect to the class action issues is necessarily limited to the very unique facts of this case and will not create a conflict among the Circuits. Applying well-established rules of federal claim preclusion, the Court of Appeals properly prevented Matsushita and its state court accomplices from subverting the protection afforded to the shareholders of MCA by selling such claims for a few pennies per share in a settlement of a state court action that did not involve any facts common to the section 14(d)(7) and Rule 14d-10 claims. The Ninth Circuit's preclusion analysis is consistent with that of the First and Third Circuits, and Matsushita has cited no cases in which the application of the Ninth Circuit's reasoning would result in a different decision.

I. THIS IS AN APPEAL FROM AN INTERLOCUTORY DECISION, NOT A FINAL JUDGMENT, AND THE ISSUES PRESENTED ARISE BECAUSE OF THE UNIQUE FACTS OF THIS CASE.

The Ninth Circuit's decision is not a final judgment. The case was remanded to the district court, and the issues of the value of Wasserman's preferred stock and the Sheinberg payment must be tried to a jury. If Matsushita is successful on remand in convincing a jury that Wasserman did not receive more consideration for his stock than the other shareholders received and that the Sheinberg payment was really only an employment bonus, not a premium payment for his stock, Matsushita will have won, and a review of the issues raised by Matsushita before this Court will not be necessary. Even if Matsushita loses at trial, it will still have the opportunity to appeal the issues presented here to this Court.

Moreover, this case arose as a result of the Wasserman transaction, a transaction which Matsushita admits was "unique."[9]

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[9]Similarly, the Sheinberg payment was unique to Sheinberg.

A review of the Ninth Circuit's application of law to these unique facts will therefore not produce enduring legal principles.[10]

II. THERE IS NO NEED FOR THIS COURT TO DECIDE WHETHER THERE IS A PRIVATE RIGHT OF ACTION UNDER RULE 14d-10.

Matsushita does not seek review of the Ninth Circuit's holding that there is a private right of action for the violation of section 14(d)(7). Rather, Matsushita requests this Court to determine whether a private right of action exists for the violation of Rule 14d-10.[11] This Court need not make such determination, however, because Matsushita does not, and cannot credibly, dispute that there is a private right of action under section 14(d)(7). Indeed, the Ninth Circuit's recognition of a private right of action under section 14(d)(7) is consistent with the jurisprudence of this Court and with the decisions of every Circuit Court that has specifically addressed the issue. (See *Field v. Trump*, 850 F.2d 938, 946 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Polaroid Corp. v. Disney*, 862 F.2d 957, 996 (3d Cir. 1988).)[12]

The court below applied the traditional four-factor test approved by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), and, following

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[10] Although the issue of whether a private right of action exists under section 14(d)(7) and Rule 14d-10 is before this Court, there is no inter-Circuit conflict for this Court to resolve. In fact, as discussed in Section II, *infra*, every Circuit Court that has decided the issue has recognized that a private right exists for the violation of section 14(d)(7).

[11] Matsushita frames Question No. 2 of its "Questions Presented" as follows:

> 2. Whether a federal court can automatically imply a private right of action under an agency regulation, here Securities and Exchange Commission Rule 14d-10, on the sole ground that the enabling statute has been held to be privately enforceable. (Petition, i.)

[12] Although the issue was not specifically addressed by the Fourth Circuit in *Kahn vs. Virginia Retirement System*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1834 (1994), by addressing the merits of the section 14(d)(7) claim, the court in *Kahn* implicitly recognized a private right of action.

the Second and Third Circuits, properly concluded that, in enacting section 14(d)(7), Congress intended to provide a damage remedy as a means of enforcing its command that every security holder who tenders his shares be paid any "increased consideration" offered to other shareholders. (App. 11a.) Simply put, the statutory language of section 14(d)(7) — that a bidder "shall pay the increased consideration" to a shareholder who was paid less than another shareholder — is more than adequate to demonstrate congressional intent to create a private right of action.

Since liability in this case is clear under section 14(d)(7), whether a private right of action exists under Rule 14d-10 in addition to section 14(d)(7) is essentially moot, and there is no need for this Court to address the issue.[13]

Realizing this, Matsushita attempts to create an issue where none exists by erroneously contending that the court below rejected the two-step inquiry adopted by the Sixth and Third Circuits in determining whether private rights of action exist under agency Rules. (Petition, page 19.) In fact, the court below cited its opinion in *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530 (9th Cir. 1984) as support for its conclusion that there is a private right of action under Rule 14d-10. (App. 5a, fn. 8.) Since the two-part test recited in *Robertson* is essentially identical to that enunciated by the courts in *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992), *Ashbrook v. Block*, 917 F.2d 918 (6th Cir. 1990), and *Angelastro v. Prudential-Bache Sec. Inc.*, 764 F.2d 939 (3d Cir. 1985), *cert. denied*, 474 U.S. 935 (1985), Matsushita's attempt to manufacture a reviewable issue should be rejected by this Court.[14]

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[13] Since the Wasserman transaction was part of Matsushita's tender offer, it is clear that Matsushita violated section 14(d)(7) by "varying" the terms of the tender offer by offering increased consideration to Wasserman without paying such increased consideration to the other shareholders.

[14] In *Robertson*, the Ninth Circuit adopted the following two-step test in determining whether a private right of action exists for the violation of an agency rule:

III. THE NINTH CIRCUIT'S SUBSTANTIVE ANALYSIS OF SECTION 14(d)(7) AND RULE 14d-10 IS CONSISTENT WITH THE DECISIONS OF THE SECOND AND FOURTH CIRCUITS.

A. The Ninth Circuit Was Correct in Refusing to Be Bound by Matsushita's Self-serving Labels and Instead Applying a Substantive Analysis of the Wasserman Transaction in Determining Whether it Was Part of Matsushita's Tender Offer.

Matsushita contends that Rule 14d-10 is designed to operate only during a "clearly-defined tender offer period," and that the Wasserman transaction cannot be deemed subject to Rule 14d-10 because the consideration paid thereunder was paid after the expiration of the time the other shareholders were required to tender their shares. The Ninth Circuit correctly rejected this rigid "stop-watch" analysis, ruling that the proper inquiry was whether the Wasserman transaction should be deemed part of the tender offer. As the Ninth Circuit observed:

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(1) whether Congress delegated authority to establish rules implying a private right of action; and (2) whether the rule in question was drafted such that this private right of action may legitimately be implied. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 679 (9th Cir. 1980) (stock exchange rules.) (*Robertson, supra*, 749 F.2d at 534.)

> Whether the Wasserman transaction violated Rule 14d-10 depends upon whether Wasserman received greater consideration than other MCA shareholders "during such tender offer," Rule 14d-10(a)(2), or whether he received a type of consideration not offered to other MCA shareholders "in a tender offer." Rule 14d-10(c).[15]

This analysis is appropriate because, while both section 14(d)(7) and Rule 14d-10 speak in terms of a "tender offer," the term "tender offer," as used in the federal securities laws, has never been interpreted to denote a rigid period of time.[16] Thus, the Ninth Circuit properly rejected Matsushita's claim that the Wasserman transaction cannot be deemed a part of the tender offer merely because it was labeled a private exchange of stock and was structured to close after the time for shareholders to tender their shares expired. Rather, the court below focused its inquiry on whether the transaction in question "was an integral part of Matsushita's tender offer."[17]

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[15]In addition, section 14(d)(7) speaks in terms of "varying" the terms of a tender offer "before the expiration thereof by increasing the consideration offered to holders of such securities." Surely Matsushita would not have this Court conclude that Congress intended to allow tender offerors to avoid their substantive obligations under section 14(d)(7) merely by structuring as an ostensibly "private" transaction one that is inseparably integrated with a formal tender offer and that pays more consideration to some target shareholders.

[16]As the court below observed:

> On the contrary, in order to prevent bidders from circumventing the Williams Act's requirements, Congress, the SEC, and the courts have steadfastly refused to give the term a fixed definition. Instead, we have held that "[t]o serve the purposes of the Williams Act, there is a need for flexibility in fashioning a definition of a tender offer." *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 950 (9th Cir. 1985). (App. 15a.)

[17](App. 17a.) The Ninth Circuit observed:

> If an ostensibly private agreement that pays a particular shareholder a sum greater than the tender price is deemed a part of the tender offer, the tender offer does not end, by definition, until that agreement is

The Ninth Circuit's substantive analysis of the Wasserman transaction is consistent with the Second Circuit's decision in *Field v. Trump, supra*, in which the court applied the same substantive analysis and found that an ostensibly "private" transaction was subject to section 14(d)(7) and Rule 14d-10. In *Field v. Trump*, the defendants commenced a tender offer at a price of $22.50 per share for shares of defendant Pay'n Save Corporation. Shortly after the market closed on the fourth business day after the announcement of the tender offer, the defendants "withdrew" the offer in order to arrange a purchase of a bloc of shares from certain dissident directors of Pay'n Save. Later that night, after acquiring an option to purchase the dissidents' shares, the defendants announced a "new" tender offer at $23.50 per share. When the price of the option was taken into account along with the payment for "fees and expenses" made to the dissident directors pursuant to the option agreement, the dissident directors received $25.00 per share, a $1.50 premium over the price paid to the other tendering shareholders.

A shareholder subsequently filed a class action against the offerors, the target company and its officers and directors, alleging that the option agreement between the offerors and the dissident directors violated section 14(d)(7) of the Williams Act and SEC Rule 10b-13, *inter alia*.

The district court dismissed the complaint under Rule 12(b)(1) and 12(b)(6), holding that the plaintiff did not state a claim under Section 14(d)(7) because the offerors had announced an effective withdrawal of their tender offer before they entered into the option

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performed. Performance of the agreement, including payment of the shareholder, will therefore take place "during the tender offer," in violation of Rule 14d-10(a)(2). Similarly, if one shareholder is offered a different type of consideration than other shareholders in a transaction that is determined to be a part of the tender offer, the bidder has offered more than one type of consideration "in a tender offer" without affording each shareholder the right to choose the package she prefers, in violation of Rule 14d-10(c)(1). (App. 17a, fn. 19.)

agreement with the dissident directors. The plaintiff appealed, and the Second Circuit Court of Appeal reversed, holding that the transaction constituted a violation of section 14(d)(7) of the Williams Act.

The court began its analysis by observing that discriminatory premium payments were illegal:

> No party disputes the proposition that payment of a premium to one shareholder and not others during a tender offer is illegal. (*Id.*, 850 F.2d at 943.)

The court then focused on the more difficult issue of whether the purported withdrawal of the tender offer effectively ended the first tender offer so that the agreement to pay a premium to the dissident shareholders pursuant to the option agreement, which had been entered into after the "first" offer and before the "second" offer, was not entered "during the tender offer."

Addressing this issue, the court endorsed a "functional test that scrutinizes such purchases in the context of various salient characteristics of tender offers and the purposes of the Williams Act," rather than simply "rubber-stamping the label used by the acquirer." (*Id.*, 850 F.2d at 944.)

After looking to the substance of the transaction in dispute, the Second Circuit concluded that the two tender offers were in reality one tender offer.[18] Concluding that the discriminatory purchase of

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[18]In determining whether a transaction is part of a tender offer, the *Field* court cited factors which the SEC has identified as relevant "[i]n establishing criteria to govern the integration of formally separate offerings." (*Id.*, 850 F.2d at 945.) Among these relevant factors were the following:

> (1) are the offerings part of a single financing;
>
> (2) do the offerings involve issuance of the same class of security;
>
> (3) are the offerings made at or about the same time? (*Id.*, 850 F.2d at 945 (quoting Section 3(a)(11) Exemption for Local Offerings, Securities Act Release No. 4434 (Dec. 6, 1961)).

The court in *Field* applied these factors to determine whether the purchase in dispute in that case was part of a tender offer, modifying the first factor by asking whether "the offers [are] part of a single plan of acquisition." (*Id.*, 850

the dissidents' shares through the option agreement was therefore made during the period of the tender offer, the court held that such transaction violated section 14(d)(7).

In *Field v. Trump*, it was clear that the additional consideration paid to the dissenting shareholders by the offeror was not paid through a formal modification of the tender offer. Although the "second" tender offer was for $23.50 per share, $1.00 more per share than the "first" tender offer, the $23.50 was offered to all shareholders. Thus, it was not the increased consideration paid pursuant to the express terms of the "second" tender offer that was the basis of the plaintiffs' claim. Rather, the basis of plaintiffs' claim in *Field* was the fact that only the dissenting shareholders received increased consideration for selling their shares to the offeror pursuant to the "option agreement," under the terms of which such shareholders effectively received an additional $1.50 per share above $23.50. Because this option agreement was entered into during the tender offer, it violated section 14(d)(7).

The evasion of section 14(d)(7) which Matsushita claims should have been permitted in this case is exactly that against which the Second Circuit in *Field* warned:

> Whether the acquisition of shares in a corporation is part of a tender offer for purposes of the Act [section 14(d)(7)] cannot be determined by rubber-stamping the label used by the acquirer. . . . Were the label used by the acquirer determinative, virtually all of the provisions of the Williams Act . . . could be evaded simply by an offeror's announcement that offers to purchase stock were private purchases." (*Id.*, 850 F.2d at 944.)

Just as the "private" stock option agreement which was entered into after the commencement of the tender offer and gave dissenting shareholders greater consideration for their stock in *Field* violated section 14(d)(7) and Rules 14d-10, the Wasserman

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F.2d at 945.) The *Field* court concluded that "all of the listed factors weigh in favor of treating the . . . acquisition . . . as a single tender offer." (*Id.*)

transaction, which was entered into ***after*** the commencement of Matsushita's formal tender offer and which gave greater consideration to Wasserman to the exclusion of the other shareholders, also violated section 14(d)(7) and Rule 14d-10.[19]

If the substantive analysis adopted by the Second Circuit and the court below were not utilized, an offeror could always thwart the purpose of section 14(d)(7) merely by entering into an ostensibly "private" agreement. If this were allowed, the remedial efficacy of section 14(d)(7) would effectively be eviscerated.[20]

What Matsushita is really asking this Court to do is to validate its attempt to escape the protective provisions of section 14(d)(7) and Rule 14d-10 merely by structuring a stock purchase entered into after the commencement of the formal tender offer as an ostensibly private transaction. The Ninth Circuit properly rejected Matsushita's claim that its obligations under the "best price / all holders" rules can so easily be avoided.[21]

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[19] Although Matsushita has attempted to limit the court's holding in *Field* to cases where there was a "payment" of higher consideration to certain shareholders "during the tender offer period," such attempt is unavailing. For purposes of section 14(d)(7), the timing of the *payment* of the higher consideration is totally irrelevant. Rather, it is the timing of the *offer* of higher consideration that is controlling: "Where any person varies the terms of a tender offer . . . by increasing the consideration ***offered*** to holders of such securities . . . " (Section 14(d)(7) (emphasis added).)

[20] The propriety of the Ninth Circuit's substantive analysis has also been expressly recognized by SEC:

> [T]he fact that . . . different consideration is offered to different holders of the same class of securities, does not mean that a tender offer has not be made under the Williams Act. ***Rather, if such a transaction is found to be a tender offer, then the tender offer would not have been made in compliance with the all-holders requirement.*** (SEC Release No. 34-22198, 1985 SEC LEXIS 1175, at *7 (July 1, 1985) (emphasis added.)

[21] *See also Wellman v. Dickinson*, 475 F.Supp. 783, 823-25 (S.D.N.Y.1979) *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069, (1983) (so-called "privately negotiated" purchases of shares constitute tender offer

B. The Ninth Circuit's Conclusion That the Wasserman Transaction Was Entered into after Matsushita's Formal Tender Offer Commenced Is Consistent with the Fourth Circuit's Decision in *Kahn*.

In support of its claim that the court below erroneously applied section 14(d)(7) and Rule 14d-10 to the Wasserman transaction, Matsushita represents to this Court that the parties "stipulated that the Wasserman transaction was entered into and consummated when no tender offer was pending." (Petition, page 22.) This representation is false. In truth, based on the facts to which Matsushita stipulated, it is clear that the Wasserman transaction was entered into ***after*** Matsushita's formal tender offer commenced.

Matsushita stipulated that its tender offer for MCA was publicly announced on the morning of November 26, 1990.[22] Pursuant to SEC Rule 14d-2, a tender offer is deemed to commence at 12:01 a.m. on the day the tender offer is publicly announced.[23] Thus,

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for purposes of Williams Act) and *Gerber v. Computer Associates International, Inc.*, 812 F.Supp. 361 (E.D.N.Y. 1993) (agreement entered into after the commencement of the tender offer between tender offeror and an officer and large shareholder of the target company, under the terms of which the shareholder agreed to sell his shares to the offeror for $15.75 per share and also agreed not to compete with the target or the offeror for a period of 5 years in return for the payment of $5,000,000, held to be subject to the proscriptions of section 14(d)(7) and Rule 14d-10 where agreement not to compete entered into after commencement of tender offer.)

[22]Consolidated CT: 354, paragraph 5.15.

[23]SEC Rule 14d-2(b)(ii) provides:

> (ii) Notwithstanding paragraph (b)(2)(i) of this section, section 14(d)(7) of the Act shall be deemed to apply to such tender offer from the date of such public announcement.

Matsushita's tender offer "commenced" at 12:01 a.m. on November 26, 1990 as a matter of law.[24]

Matsushita also stipulated that the Wasserman transaction was entered into at the earliest ***after*** 12:01 a.m. on November 26, 1990.[25] Thus, the Ninth Circuit properly recognized that, for purposes of section 14(d)(7) and Rule 14d-10, the Wasserman transaction was entered into after the commencement of Matsushita's tender offer. (App. page 16a, fn. 18.)

Contrary to Matsushita's contention, this holding is consistent with the Fourth Circuit's decision in *Kahn vs. Virginia Retirement System, supra.* In *Kahn*, the Fourth Circuit held that the Williams Act became operative when a purchaser makes a "tender offer" and that, under Rule 14d-2, the public announcement by a bidder constitutes the commencement of a tender offer, triggering the application of the Williams Act.[26] This holding is consistent with the Ninth Circuit's conclusion that the public announcement of the tender offer made by Matsushita and MCA on November 25, 1990 constituted the commencement of Matsushita's tender offer for purposes of Minton's section 14(d)(7) and Rule 14d-10 claims, not-

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[24] This analysis is consistent with the SEC's analysis:

> The Commission also has interpreted the Williams Act to require that the amount of consideration a bidder must pay a security holder in a tender offer conducted pursuant to Regulation 14D must be the highest consideration **offered to any security holder at any time during such tender offer**. [Footnote 10: "See Rule 14D-2(b)(2)(ii), 17 CFR 240.14-d(2)(b)(2)(ii), which provides that Section 14(d)(7) of the Exchange Act shall be deemed to apply to such tender offer from the date of the public announcement."] (Federal Securities Law Reports, SEC Release No. 6395, page 87,563.)

[25]Consolidated CT: 354, paragraphs 5.17 and 5.18.

[26]The Court stated:

> Rule 14d-2 states that the issuance of a "public announcement by a bidder ... with respect to a tender offer ... shall be deemed to constitute the commencement of a tender offer" and thus trigger the application of the Williams Act. (*Id.*, 13 F.2d at 114.)

withstanding the fact that the formal Offer to Purchase was sent out on November 30, 1990.[27]

IV. THE NINTH CIRCUIT'S PRECLUSION ANALYSIS IS CONSISTENT WITH THE FIRST AND THIRD CIRCUIT'S DECISIONS.

The court below refused to give preclusive effect to a collusive settlement agreement entered into in a dormant Delaware state court class action that purported to release the exclusively federal section 14(d)(7) and Rule 14d-10 claims in this case, where the facts underlying such claims were not and could not be litigated in the state court action, and where a litigated judgment would not have had any preclusive effect on such exclusively federal claims. (App. 28a-40a.)

Rather than briefing this issue at length, Minton joins in the brief of the Epstein Plaintiffs regarding the class action issues. Minton would point out, however, that, contrary to Matsushita's contention, this decision is consistent with the decisions of the First and Third Circuits in *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991) and *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 408 (1994).

In *Grimes*, the Delaware state court action, unlike the Delaware state court action filed in connection with Matsushita's tender offer for MCA, involved the same predicate facts that were the basis of the federal court action, *i.e.*, issues of nondisclosure by the defendants in connection with a merger agreement. In ruling that

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[27] As can be seen, the facts in *Kahn* are completely distinguishable from the facts in this case. Unlike the Stock Sale and Railroad Sale agreements in *Kahn*, the documents reflecting the Wasserman transaction and the Sheinberg Agreement were not executed before the commencement of the tender offer, but *after* the commencement of the tender offer. (*See also, Gerber v. Computer Assocs. Intl.*, *supra* at 365-366 (where there was a public announcement of a tender offer on August 16 and a formal Offer to Purchase on August 22, the tender offer commenced for purposes of section 14(d)(7) and Rule 14d-10 claims at the time of the public announcement, notwithstanding the fact that the formal Offer to Purchase was sent on August 22).)

the state court judgment incorporating the terms of the class action settlement was binding on the federal claims, the court in *Grimes* relied on the fact that the federal action involved claims "arising from the same nucleus of operative facts." (*Id.*, 17 F.3d at 1563.) This is the identical test that the Ninth Circuit adopted in this case.

Similarly, in *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), the First Circuit, citing *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982), applied "same nucleus of operative fact" test to a subsequent federal court action involving federal law claims that stemmed from the same operative facts as the state law claims and concluded that the state court release could serve as a bar to such federal claims. (*Id.*, 925 F.2d at 34.)

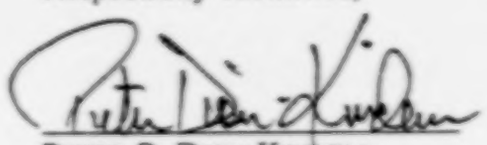
There is nothing inconsistent with the decision of the court below and the decisions of the First and Third Circuits, and Matsushita has cited no cases in which the application of the Ninth Circuit's preclusion analysis would result in a different decision.

CONCLUSION

The decision of the court of appeals is consistent with the jurisprudence of this Court and with the decisions of every Circuit Court that has addressed similar issues. Matsushita's request that this Court expend its valuable time to review an interlocutory ruling on unique transactions structured with the intent of evading the "best price" securities laws for the benefit of two wealthy individuals should be denied.

May 19, 1995

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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RULE 29.1 STATEMENT

Pursuant to Sup. Ct. R. 29.1, Petitioners Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corporation hereby state that their only parent or subsidiary that is not wholly-owned is Cineplex Odeon Corporation.

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PETITIONERS' REPLY BRIEF

The Ninth Circuit's opinion announced new legal principles of broad applicability concerning (1) the balance of authority between state and federal courts, (2) the implication of private rights of action under administrative rules, and (3) the nature of the event that triggers federal tender offer regulation. Each of these new legal principles puts the Ninth Circuit in irreconcilable conflict with the established law of other circuit courts:

- In conflict with the law of the First and Third Circuits, the Ninth Circuit refused to give Full Faith and Credit to a state court judgment entered upon a class action settlement, utilizing an analysis that jeopardizes all comprehensive settlements of state court class actions which involve the compromise of both state and exclusively federal claims. *Petition for a Writ of Certiorari* ("*Pet.*") at 10-17.

- In conflict with the law of the District of Columbia, Third, and Sixth Circuits, the Ninth Circuit held that an agency rule promulgated pursuant to an enabling statute that has been held to be privately enforceable *automatically* will have a private right of action. *Pet.* at 17-21.

- In conflict with the law of the Fourth Circuit (and uniform SEC authority), the Ninth Circuit transformed a precise and well understood tender offer regulation into an amorphous rule, thereby eliminating the predictability necessary to structure tender offers. *Pet.* at 21-24.

Far from merely resolving a "unique" factual dispute, the Ninth Circuit's enunciation of these new legal principles has generated extraordinary uncertainty in a number of legal arenas.

Respondents suggest that the Court look past this case on the strength of their representation that the Delaware settlement was the product of a corrupt state bar and judiciary. *Epstein Brief in Opposition* ("*Epstein Opp.*") at 15-26. Yet Respondents concede that such was not the basis of the Ninth Circuit's decision. *Id.* at 5, 22. The Ninth Circuit's opinion urgently requires review because it provides circuit court authority to upset state court approved class action settlements releasing both state and federal claims *regardless* of the adequacy of class representation or level of judicial review to which the settlement was subjected.[1]

This petition is not premature. Contrary to Respondents' suggestion that further district court proceedings may "moot or reshape" the Ninth Circuit's holdings, *Epstein Opp.* at 3, the Ninth Circuit's decision has established novel and far reaching legal principles, none of which can be altered by proceedings on

[1] The adequacy of representation and notice to the class were litigated in the Delaware Chancery Court, which held that both were adequate. *See* App. 73a-74a. These findings are entitled to preclusive effect. *See, e.g., Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32 (1st Cir. 1991). In any event, as Respondents concede, the Ninth Circuit's holding is not predicated on these issues. Respondents are, in addition, barred from now attacking the Delaware proceedings as a result of their strategic decision to absent themselves from those proceedings. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Assoc.*, 455 U.S. 691, 710 (1982).

remand. The court of appeals entered summary judgment for Respondents and held that Matsushita had violated Rule 14d-10 as a matter of law. Thus, the Ninth Circuit has conclusively resolved the substantive liability issues with respect to Mr. Wasserman's receipt of Matsushita preferred stock, leaving only an assessment of damages for determination on remand.[2]

I. THE NINTH CIRCUIT HAS CREATED A NEW RULE OF STATE-FEDERAL PRECLUSION THAT VIOLATES PRINCIPLES OF FEDERALISM AND FRUSTRATES CLASS ACTION SETTLEMENTS

Respondents' opposition briefs fail to address each of the following points:

- The Ninth Circuit disregarded the provision of the Full Faith and Credit Act that required the Ninth Circuit to give the Delaware judgment approving the class action settlement the same preclusive effect that a Delaware court would give it. *See, e.g., Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986); *Pet.* at 10.

- Delaware courts would have enforced the release embodied in the judgment and precluded further prosecution of any claims encompassed in the release by any class members who did not opt out of the Delaware settlement. *Pet.* at 10-11 & n.6.[3] The

[2] *See* 28 U.S.C. § 1254(1); *see also* 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4036, at 19 (1988) ("[c]ertiorari may be granted to review decisions that do not dispose of the pending litigation"); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 566-67 (1979) (certiorari granted to review circuit court decision reversing and remanding dismissal for no private right of action); *Miller v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (certiorari granted when "resolution of this basic [private right of action] issue should be made at this stage of the litigation and not postponed until after a trial under the Court of Appeals' decision"); Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 197 (7th ed. 1983) (gathering cases in which this Court has reviewed decisions "where the court of appeals had reversed the granting of a motion to dismiss and . . . remanded for trial").

[3] Professor Coffee's article, *Suspect Settlements in Securities Litigation*, N.Y. L. J. at 5, col. 1 (Mar. 28, 1991), upon which Respondents heavily rely (*Epstein Opp.* at 25-26), addresses non opt out settlements. But the judgment to which the Ninth Circuit refused to afford full faith and credit involved an opt out settlement.

Ninth Circuit, however, never addressed Delaware preclusion law—a *per se* reversible error. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985); *Pet.* at 10.

- Respondents also fail to address the central inquiry of a preclusion analysis: whether the federal securities laws create an implied repeal of 28 U.S.C. § 1738. Respondents do not challenge the fact that the only relevant case law holds that the federal securities laws do not create such an implied repeal. *Pet.* at 15.

Rather than follow the teachings of *Parsons, Marrese* and other cases decided by this Court and cited in the Petition, the Ninth Circuit created an exception to the Full Faith and Credit Act for any class action potentially touching on exclusively federal claims. The national consequences of this decision for class action litigations are enormous. *Pet.* at 7-8, 15-17.

Matsushita's petition seeks relief from the failure of the Ninth Circuit to afford full faith and credit to a class action *judgment incorporating a release*. Matsushita's position is not premised on the theory that a claim was litigated to conclusion in the state court action and therefore subject to claim preclusion. Respondents pointlessly focus on the prerequisites for claim preclusion, which are irrelevant to an analysis of the effect of a release contained in a judgment entered on a class action settlement. Indeed, the Ninth Circuit's failure to recognize the distinction between the preclusive effect of a release contained in a judgment and the doctrine of claim preclusion is a fundamental flaw in its analysis.

With this distinction in mind, it is apparent that *Nottingham, Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994), and *Sandler Associates, L.P. v. BellSouth Corp.*, 818 F. Supp. 695 (D. Del. 1993), *aff'd without op.*, 26 F.3d 123 (3d Cir.), *cert. denied*, 115 S. Ct. 481 (1994), are directly contradicted by the Ninth Circuit decision. *Pet.* at 11 (setting forth the law of the First and Third

Circuits with respect to the preclusive effect of a release).[4] In addressing the First and Third Circuit authorities, Respondents skirt *Nottingham* (thereby avoiding any substantive discussion of the law of the First Circuit), omit reference to the relevant portion of *Grimes* concerning release, and ignore entirely the *Sandler* decision.

The Ninth Circuit's straightforward disregard of a state court judgment presumed to be otherwise valid is a matter of general public importance. If allowed to stand, the decision will subvert established principles of comity and federalism, proliferate litigation in federal forums by forcing shareholder litigation into federal court, and defeat the legitimate expectations of settling parties by refusing to hold class plaintiffs to the express terms of a settlement to which they never objected and pursuant to which they accepted compensation. *Sandler*, 818 F. Supp. at 705; *see Pet.* at 16-17.

II. TENDER OFFERS REQUIRE CERTAINTY REGARDING THE PARAMETERS OF RULE 14d-10

The scope of federal tender offer regulation is likewise a matter of national importance. The Ninth Circuit's holding concerning the scope of Rule 14d-10, contrary to Respondents' assertion, is not limited to the supposedly "unique" and "complex" Wasserman transaction. While the Wasserman transaction involved a complex structure, the decision of the Ninth Circuit *should* have turned on the simple and straightforward question of whether the transaction occurred *during the tender offer*. As written (and as previously construed by courts and universally understood by securities law practitioners), Rule 14d-10 operates

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[4] Respondents' assertion that the Delaware settlement released claims factually unrelated to the federal claims is irrelevant and demonstrably false. The operative complaint in the Delaware action included a claim that the defendants had breached their fiduciary duties by according "preferential treatment" to Wasserman whereby he would "receive preferred stock in a subsidiary of Matsushita in exchange for his holdings of MCA shares" in order "to afford [him] tax-free treatment not available to other shareholders, and to save Wasserman millions of dollars in taxes that would be due if he received cash." *Appendix to Supplemental Brief of Defendants-Appellees Regarding Preclusion*, at A29, ¶¶ 46, 48. This is the same alleged discriminatory treatment in favor of Wasserman that is the essence of the Rule 14d-10 claim.

during a specifically-defined time period: from the commencement of the tender offer (defined in Rule 14d-2) until the time the tender offer terminates (upon the offeror's acceptance of tendered shares, *see, e.g.*, Section 14(d)(7)).[5] Applied as written, the Rule does not encompass the Wasserman (or Sheinberg) transaction.[6] There is no question that based on the stipulated facts the Wasserman transaction occurred when no tender offer was pending. *Pet.* at 22 n.20; *see also* App. 49a-50a (stipulated facts incorporated in the district court judgment). If the transaction occurred outside the regulated period, it is no more relevant if it occurred 10 minutes or 10 months outside that period.

The Ninth Circuit "deemed" the Wasserman transaction to have occurred during the tender offer period (regardless of when the transaction actually occurred), based on its conclusion that the Wasserman transaction was "conditioned" on the success of the tender offer. The Ninth Circuit's decision creates a new rule that plainly encompasses any transaction of any form that is "conditioned" on the tender offer being consummated, and any transaction that may be deemed an "integral part" of a tender offer, regardless of when such a transaction actually takes place. This holding deals a fatal blow to certainty and predictability and may well create a litigation morass.

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[5] Two particularly egregious misstatements of law by Respondents must be noted. First, Respondent Minton's discussion of Rule 14d-2 carefully scissors out a crucial operative provision of that Rule. In its *entirety*, Rule 14d-2 makes clear that when, *as was stipulated here*, the bidder files a Schedule 14D-1 within five days after the public announcement, the tender offer period commences on the date of that filing and *not* at 12:01 a.m. on the date of the public announcement. *See* Rule 14d-2(b)(2)(i). The Wasserman transaction indisputably occurred outside the tender offer period because the parties stipulated that the Wasserman transaction was entered into before and consummated after the tender offer period as defined in Rule 14d-2 and Section 14(d)(7). *See Pet.* at 22 n.20. Second, in addressing the merits of Rule 14d-10, Respondents rely heavily on arguments purportedly derived from Section 14(d)(7). Respondents fail to acknowledge that Section 14(d)(7) was never pleaded in an operative complaint. Nor does (or could) Section 14(d)(7) play any role in the Ninth Circuit's decision regarding the merits of Rule 14d-10. *See Pet.* at 20-21.

[6] Compliance with the 1934 Act requires reference to definite, easily ascertainable rules. Sections 13(d)(1) and 16(b), for example, establish precise periods of application. *See* 15 U.S.C. §§ 78m(d)(1); 78p(b).

The decision below also widened the scope of Rule 14d-10 by applying it to the employment-related payment to Mr. Sheinberg. The decision puts into question whether payments conventionally made to members of the management of a company in connection with their employment (such as bonuses if they agree to stay on after a tender offer) violate Rule 14d-10—even though courts and the SEC have approved such payments for many years.[7] Thus, it is the Ninth Circuit's decision to adopt a flexible interpretation to a heretofore precisely-defined Rule 14d-10 that makes review by this Court so critical in this case. The Ninth Circuit's decision undoes the specificity of Rule 14d-10 and thereby the predictability of the law governing tender offers—a concern addressed by this Court in other securities cases. *See, e.g., Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985); *Pinter v. Dahl*, 486 U.S. 622, 652-53 (1988).[8]

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[7] *See, e.g., Kramer v. Time Warner, Inc.*, 1990-91 Fed. Sec. L. Rep. (CCH) ¶ 95,619 at 97,902-903 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 767 (2d Cir. 1991). In *Canoga Industries*, 1976 SEC No-Act. LEXIS 606 (Mar. 9, 1976), the SEC approved an acquisition plan that contemplated a private agreement which was to be entered into prior to the announcement of the tender offer, pursuant to which the tender offeror would purchase certain shareholders' stock on terms and for consideration different than those being offered to the public. There, as here, the private agreement was closed following the expiration of the tender offer. *See also Guthrie Corp.*, 1975 SEC No-Act. LEXIS 1316 (June 29, 1975) (same); *W.R. Grace & Co.*, 1975 SEC No-Act. LEXIS 749 (Apr. 17, 1975) (same).

[8] *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), the only case relied upon by Respondents in support of their interpretation of Rule 14d-10, is inapposite. In analyzing two ostensibly separate public tender offers which were alleged to constitute one tender offer, *Field* found only that the plaintiffs therein had pleaded the minimal level of facts to survive a Rule 12(b)(6) motion to dismiss their Section 14(d)(7) claim. At issue was whether "the purported withdrawal" of the "first" tender offer was real. *Id.* at 943. The Second Circuit concluded that "the mere announcement of a withdrawal may not be effective if followed by purchases of shares and other conduct inconsistent with a genuine intent to withdraw." *Id.* at 944. No question similar to those in the instant case was before the *Field* court and *no Rule 14d-10 claim was at issue*. The Second Circuit has had no trouble limiting *Field* to its unique facts, *see Kramer v. Time Warner, Inc.*, 937 F.2d 767, 779 (2d Cir. 1991), and, until the Ninth Circuit opinion, *Field* had never been followed.

III. THE NINTH CIRCUIT HAS CREATED A NEW AND IMPROPER STANDARD FOR IMPLYING PRIVATE RIGHTS OF ACTION

Respondents do not challenge the core of Matsushita's implied rights analysis.[9] As Matsushita previously demonstrated, the Ninth Circuit's implied rights analysis leads to the untenable result that every rule promulgated pursuant to a privately enforceable statute has a private right of action. *Pet.* at 19. The cases cited by Respondents finding an implied right of action under Sections 14(d)(7) and 14(d)(6) are irrelevant. *See, e.g., Field*, 850 F.2d at 945 (Section 14(d)(7)); *Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.) (Section 14(d)(6)), *cert. denied*, 479 U.S. 954 (1986). In their complaints and now, Respondents make their claims under Rule 14d-10, not Section 14(d)(7). Rule 14d-10 should not be read to afford a private right of action because even if a private right is recognized under Section 14(d)(7), "the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991). The Epstein Respondents state that "[t]he rule [14d-10(c)] requires that where a tender offerer employs more than one kind of consideration . . . each shareholder must be allowed the same right to choose among the options offered." *Epstein Opp.* at 7. This erroneous interpretation of Rule 14d-10(c), which was endorsed by the Ninth Circuit, goes far beyond Section 14(d)(7), which requires that *higher* consideration be paid to certain shareholders before a claim is actionable.

[9] Respondents' claim that Matsushita's implied right of action point was not properly presented on appeal is meritless and was rejected by the Ninth Circuit.

CONCLUSION

The decision of the court of appeals creates important conflicts with the law of other circuits on three issues of national significance. The petition for a writ of certiorari should be granted.

Dated: May 26, 1995

Respectfully submitted,

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No. 94-1809

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IN THE

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OCTOBER TERM, 1994

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Petitioners,

—v.—

LAWRENCE EPSTEIN, *et al.*,

Respondents.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.
and MATSUSHITA HOLDING CORPORATION,

Petitioners,

—v.—

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE BUSINESS ROUNDTABLE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE BUSINESS ROUNDTABLE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, The Business Roundtable ("The Roundtable") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the Petition. Petitioners have consented to the filing of the brief in support of the Petition; respondents have not.

INTEREST OF THE BUSINESS ROUNDTABLE

The Roundtable is an association of corporate chief executive officers who examine public policy issues that affect the economy and develop positions which seek to reflect sound economic and social principles. The Roundtable includes representation from approximately 220 large corporations. Those corporations embrace a wide spectrum of enterprises—such as manufacturing, the extractive industries, banking, retailing, insurance, transportation and communications—and are located throughout the United States.

The Roundtable believes that the interests of American business are closely intertwined with those of the American public, because the American public is directly involved with business as consumers, employees, investors and suppliers. The Roundtable's analysis of the significance and consequences of the decision below thus provides a broad and important perspective which it believes will assist the Court. As a representative of hundreds of large corporations, The Roundtable has a unique familiarity with the class action mechanism and the wide scope of actions encompassed by state and federal class action settlements. As set forth in the accompanying amicus brief, The Roundtable is concerned that the decision of the Court of Appeals for the Ninth Circuit creates great uncertainty for the finality of numerous class action settlements and will, if not corrected, significantly impede the ability to settle such disputes in the future.

In submitting the accompanying amicus brief supporting the petition for a writ of certiorari, The Roundtable wishes to

explain why, from its perspective and the perspective of efficient judicial administration, the issues raised by the Ninth Circuit's decision are of such overriding importance as to warrant certiorari review. The Roundtable believes that this perspective will assist the Court in its consideration of the Petition and therefore respectfully moves for leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petition, by *amicus curiae* The Business Roundtable. The consent of the parties to the filing of this brief has been requested. Petitioners have given consent; respondents have not.

INTEREST OF THE AMICUS CURIAE

The Business Roundtable is an association of chief executive officers of approximately 220 major corporations representing virtually every major business sector in the United States, which examines public policy issues that affect the economy and develops positions which seek to reflect sound economic and social principles. Because members of The Business Roundtable have substantial familiarity with class action settlements—whose integrity and finality have in many cases been called into question by the Ninth Circuit's decision—The Business Roundtable and its members have a substantial interest in the Court's resolution of the questions presented by the Petition.

SUMMARY OF ARGUMENT

Settlement, efficiency and finality are three bedrock goals of our civil justice system. They assume special importance in complex class action litigation, in which an array of claims may be brought on behalf of literally thousands of plaintiffs located throughout the country. In this context, our preference for settlement, the dictates of judicial economy and the need for finality have given rise to the widely accepted principle that the settlement of a class action—federal or state—binds all class members with respect to all claims released, so long as the settlement has received judicial scrutiny and comports with due process.

The Ninth Circuit's decision below severely undermines this fundamental principle. It places an inapposite "jurisdictional" constraint on the scope of class action settlements with the admonition that "a court's jurisdiction to extinguish claims by class settlement should not exceed its jurisdiction to extinguish claims by adjudication." *Epstein* v. *MCA, Inc.*, 50 F.3d 644, 664 (9th Cir. 1995). This new constraint, however, has no basis in the jurisprudence of this Court. To the contrary, parties have long been able to effectuate class action settlements without regard to whether the court before which those parties appeared would otherwise have jurisdiction to adjudicate the settled claims. The question is one of contract—not jurisdiction.

The Ninth Circuit recognized that contractual principles govern the scope of releases with respect to "the settlement of traditional litigation by individual parties," *id.* at 666, but refused to apply these principles to class actions because of its view that "the settlement of a class action is fundamentally different from the settlement of traditional litigation." *Id.* The Ninth Circuit, however, cited no case law, statutory or rule authority for its determination not to apply contractual principles to class action settlements; nor did it argue that applying such principles would violate due process. Instead, the court below simply fashioned its own law in refusing to enforce the release of exclusively federal claims in the state class action settlement before it. Moreover, in doing so, the Ninth Circuit ignored the fact that the principal reason offered for this new limitation on class action settlements—that such settlements are subject to judicial approval while private settlements are not—militates toward *greater* solicitude for the finality and enforcement of class action settlements, rather than new, unfounded constraints on their contractual scope.

Uncorrected, the Ninth Circuit's decision will yield serious and untoward consequences for both the state and federal civil justice system. First, the decision retroactively calls into question the finality and repose of any class action settlement that released claims over which the settling court did not have jurisdiction and which are not yet time-barred. It thus may

spur a wave of new litigation over claims that were, until the Ninth Circuit's decision, unequivocally resolved in class action settlements that had received the final approval of the courts. Second, the decision will make the settlement of future class actions—both state and federal—considerably more difficult to achieve. Because it will often be the case that no court has jurisdiction over all claims and parties, global class action settlements will become increasingly rare. Further, the litigation in different forums of multiple class actions involving the same parties will proliferate—an extremely disturbing result from the standpoint of judicial administration and the already substantial burdens of class action litigation.

This Court should grant certiorari to resolve the disabling uncertainty created by the Ninth Circuit's departure from accepted principles of settlement and class action law. If not reversed, the decision below will have destructive effects on the ability to settle not only class actions involving the federal securities laws, but also class action settlements involving antitrust, environmental, and numerous other federal and state statutes in which there is exclusive jurisdiction in only one group of courts.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE LONG-STANDING RULE THAT ANY CLAIM CAN BE CONTRACTUALLY RELEASED IN A LITIGATION SETTLEMENT

In its decision below, the Ninth Circuit ruled, contrary to the decisions of other Circuits, that class action settlements cannot release claims which are not subject to the jurisdiction of the court approving the settlement. *Epstein* v. *MCA, Inc.*, 50 F.3d 644 (9th Cir. 1995). As a result, the Ninth Circuit refused to give effect to the contractual release of federal

securities claims in a Delaware class action settlement agreement because those claims could not have been adjudicated by the Delaware state court. The Ninth Circuit made this ruling despite the fact that of the 10,000 or more class members who were permitted to opt out of the settlement, only 19 chose to do so. The decision will thus allow those thousands of class members to enjoy the benefits of the Delaware class action settlement, but still repudiate the release of federal securities claims that was an unequivocal part of the quid-pro-quo for that settlement. Such a result, which is not based upon any authority, severely undermines the law of both settlements and class actions.[1]

A. It Has Always Been The Law That Parties Can Finally Settle Claims In One Jurisdiction Even Where Those Claims Could Not Be Adjudicated In That Jurisdiction

It is well-established that parties are permitted to release and settle any claims they choose regardless of where those claims are pending, or whether those claims could be adjudicated in the court presiding over the settlement.[2] Until the

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[1] The Ninth Circuit held that a state court could approve the release of exclusively federal claims that would have been extinguished by the issue preclusive effect of an adjudication of the state claims. 50 F.3d at 664. This ruling, however, only compounds the problems caused by the decision below since it severely limits the contractual scope of class action releases, without any basis for doing so, and creates even greater uncertainty with respect to the scope of claims being released.

[2] Thus, a settlement reached in one state court often releases claims subject to the laws of another state. *See, e.g., Steiner* v. *Sithe-Energies L.P.*, 1988 WL 36133 (Del. Ch. April 4, 1988) (Delaware state court approving settlement of class action releasing claims pending in California state court); *Mendelson Bros. Factors, Inc.* v. *Sachs*, 1 N.Y.S.2d 838 (1st Dep't 1938), *aff'd*, 17 N.E.2d 459 (1938) (shareholders' derivative action settled and approved by Delaware state court barred action in New York state courts). Similarly, a settlement reached in a state court may preclude an action asserting federal claims in a federal court. *See, e.g., Sandler Associates, L.P.* v. *BellSouth Corp.*, 818 F.

Ninth Circuit's decision below, therefore, courts have not hesitated to broadly approve the release of claims in a settlement agreement, regardless of whether those claims were subject to the jurisdiction of the approving court. *See Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991).[3]

The policy behind approving the broad release of settled claims is clear: to facilitate and encourage the settlement of disputes which would otherwise require prolonged and burdensome litigation. *See, e.g., Williams* v. *First Nat'l Bank*,

Supp. 695, 701 (D. Del. 1993), *aff'd*, 26 F.3d 123 (3d Cir.), *cert. denied*, 115 S. Ct. 481 (1994) (settlement of state court class action arising out of proxy statement releasing all claims that might be asserted in connection with the litigation foreclosed federal action framing previous allegations as violations of federal law).

[3] *See also In re VMS Securities Litigation*, 21 F.3d 139 (7th Cir. 1994) (finding that it was "irrelevant" whether federal court had subject matter jurisdiction over state law claim that it released where objectors chose not to opt out of settlement); *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268, 1288 (9th Cir.), *cert. denied*, 113 S. Ct. 408 (1992) ("[I]t was not necessary for the district court to actually exercise subject matter jurisdiction over the claims to approve their release."); *TBK Partners, Ltd.* v. *Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981), *cert. denied*, *CFS Continental, Inc.* v. *Adams Extract Co.*, 456 U.S. 998 (1982) (even if "the court does not have power to adjudicate a claim, it may still 'approve release of that claim as a condition of settlement' ") (*quoting Abramson* v. *Pennwood Investment Corp.* 392 F.2d 759, 762 (2d Cir. 1968)); *Sandler*, 818 F. Supp. at 704; *Gabelli* v. *Sikes Corp.*, 1990 WL 213119, *5 (S.D.N.Y. Dec. 14, 1990) ("[T]he Second Circuit has explicitly held that although a state court cannot adjudicate a federal claim, 'it is within its power . . . to approve the release of that claim as a condition of settlement of the state action.' ") (citations omitted); *Lowenschuss* v. *Resorts Int'l, Inc.*, 1989 U.S. Dist. LEXIS 7407 (E.D. Pa. June 29, 1989), *aff'd*, 947 F.2d 936 (3d Cir. 1991); *Seagoing Uniform Corp.* v. *Texaco, Inc.*, 705 F. Supp. 918, 923 (S.D.N.Y. 1989) ("[I]t is, of course, true that a state court has authority to approve a settlement that compromises claims within the exclusive jurisdiction of federal courts . . . .").

216 U.S. 582, 595 (1910) ("[C]ompromises of disputed claims are favored by the courts . . . ."); *Marek* v. *Chesny*, 473 U.S. 1, 10 (1985) ("[S]ettlements rather than litigation will serve the interests of plaintiffs as well as defendants.").[4] Indeed, settlement agreements are " 'highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts . . . and preventing lawsuits.' " *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 401 (Powell, J., dissenting), *reh'g denied*, 434 U.S. 989 (1977) (*quoting Pearson* v. *Ecological Science Corp.*, 522 F.2d 171, 176 (5th Cir. 1975) (*quoting D.H. Overmyer Co.* v. *Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971))).

For the above-stated reasons, if settlement releases are clear and entered into without mistake or fraud—as was the case here—they should be enforced according to their terms. *See, e.g., Ruskay* v. *Waddell*, 552 F.2d 392, 398 (2d Cir. 1977), *cert. denied*, 434 U.S. 911 (1977). As explained by the court in *Ruskay*:

> In an era of ever-increasing caseloads, the settlement of complex lawsuits is a welcome development. Without it, judicial administration would prove an impossible task. Thus, strong policy considerations require that what all parties thought to be a closed matter remain so. One who gives a general release has had his opportunity to press his claim . . . . *Once the decision to settle is made, a party must abide by it.*

Id. (emphasis added).

[4] *See also McDermott, Inc.* v. *AmClyde*, 114 S. Ct. 1461, 1468 (1994) (parties seek settlement "to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relationships"); *St. Louis Mining and Milling Co.* v. *Montana Mining Co.*, 171 U.S. 650, 656 (1898).

B. The Ninth Circuit's Announcement Of A New Jurisdictional Constraint On Class Action Settlements Is An Unwarranted Departure From Established Class Action Law

The Court of Appeals below acknowledged the applicability of the above-stated principles to *individual* settlements and releases, but then went on to hold—without citing any supporting authority—that class action settlements could not be similarly enforced. 50 F.3d at 666-67. Specifically, the Court of Appeals stated that because class members are not all present before the court and judicial approval is required of a class action settlement, such settlements could not include claims that were beyond the jurisdiction of the approving court to adjudicate. *Id.* at 667. The Roundtable believes that this reasoning—which is not based on any case, statutory or rule authority, or principle of due process—is flawed.

Throughout its history, the principal purposes of the class action mechanism have remained the same: to promote "the efficiency and economy of litigation." *General Tel. Co. of Southwest* v. *Falcon*, 457 U.S. 147, 159 (1982); *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553, *reh'g denied*, 415 U.S. 952 (1974); 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.01 at 1-3 (3d ed. 1992). By combining similarly situated litigants into one class, and permitting settlement, a class action can "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated . . . ." Fed. R. Civ. P. 23 Advisory Committee Notes to 1966 Amendment; *United States Parole Com.* v. *Geraghty*, 445 U.S. 388, 403 (1980).[5] Because class actions are designed to facilitate settlements on a large scale and conserve judicial resources, the importance of the release as a final and binding contract is even more

[5] *See also Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985); 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1754 (1986); 1 *Newberg on Class Actions* § 1.01 at 1-18; Thomas A. Dickerson, *Class Actions: The Law Of 50 States* § 1.01[2] (1988).

important in the class action context than it is for individual lawsuits. *See, e.g. Air Lines Stewards & Stewardesses Ass'n* v. *Trans World Airlines, Inc.*, 630 F.2d 1164, 1167 (1980), *aff'd, Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982) (the preference for settlement "has particular force regarding class action lawsuits"). Indeed, under current law, the vast majority of class actions have been able to settle before trial.[6]

It is true, as the Ninth Circuit points out, that class action settlements are different from individual settlements in that additional procedural protections, including the requirement of court approval, are provided to satisfy due process concerns. 50 F.3d at 667. However, that difference makes it more, not less, appropriate to enforce the release of *all* claims discharged as part of a judicially approved class action settlement. Indeed, to comport with due process, members of a class are provided with a host of procedural protections to ensure that any class action settlement is reasonable and fair—protections not afforded in non-class actions. *See generally Phillips Petroleum*, 472 U.S. at 808-14. In the class at issue here, these protections included the right to opt out of the class action settlement—a right which only 19 class members out of thousands decided to utilize. It can hardly be said that it is unfair to require the remaining class members who chose to accept the benefits of the settlement to be bound by the release of securities law claims which was an express and integral part of that settlement.

The federal and state rules governing class actions, plus the requirements of due process set forth by this Court in *Phillips Petroleum*, establish the proper limits of class action settlements. The Ninth Circuit improperly imposed its own additional limitation without any authority for doing so.

[6] One study indicates that approximately 71% of class actions settle prior to judgment. Thomas M. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U.L. Rev. 542, 544-47 (1980), *cited in Franklin* v. *KayPro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989), *cert. denied, Franklin* v. *Peat Marwick Main & Co.*, 498 U.S. 890 (1990).

Nor can the Ninth Circuit's decision be justified by any doubts it may have had about the competence or ability of state court judges properly to review a class action settlement releasing both state and exclusively federal claims. "[A] state judge's resolution of a factual issue will be presumed to be correct unless the factfinding *procedure* employed by the state court was not adequate." *Swain* v. *Pressley*, 430 U.S. 372, 383 (1977) (emphasis added). As Justice Scalia explained:

> It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not). And it would be an unworkable constitution that requires redetermination in federal courts of all issues of pervasive federal constitutional law that arise in state-court litigation. Absent indication to the contrary, *state courts should be presumed to have applied federal law as faithfully as federal courts.*"

Withrow v. *Williams*, 113 S. Ct. 1745, *reh'g denied*, 113 S. Ct. 3066 (1993) (Scalia, J., concurring in part, dissenting in part) (emphasis added). There is simply no basis to impose an unprecedented jurisdictional limitation on the scope of class action settlements approved by state courts.

II. IF NOT REVERSED, THE NINTH CIRCUIT'S DECISION WILL HAVE A DISABLING AND DESTRUCTIVE EFFECT ON CLASS ACTION SETTLEMENTS

If not corrected, the Ninth Circuit's decision may well lead to a deluge of litigants seeking to re-open class action claims that were finally and conclusively settled long ago. For, as long as the statute of limitations has not run on any class claims which are beyond the approving court's jurisdiction, class members would be free to repudiate any release of those claims included in a class action settlement. This would be true not only as to securities law class actions, but also as to

numerous other class action settlements in which the approving state court did not have jurisdiction to adjudicate the exclusively federal claims being released.[7]

In all previous class action settlements, the parties have properly relied upon the fact that once the settlement received final judicial approval, all settled claims were released—whether or not those claims were within the jurisdiction of the approving court to adjudicate. This substantial reliance interest will be destroyed if the decision below stands and class members are permitted to accept the benefits of a class action settlement without being bound to the release of claims that was the quid-pro-quo for that settlement.

Further, the decision below will have the additional harmful effect of making it more difficult to settle class actions in the future. Under the jurisdictional constraint announced by the Ninth Circuit, class action representatives often will be unable to release *all* of their claims in a single settlement. To the contrary, whenever there is any chance that an exclusively federal claim could be brought against the defendants by the class, it will be impossible for the class action representatives to settle that claim in state court as part of an overall settlement. Similarly, a class action brought in federal court will not be able to release all claims of the class unless a determination is made that the federal court has subject matter jurisdiction over all of the claims being released. For example, a class action settlement in federal court would not be able to release any state law claim that does not meet the requirements of federal diversity or supplemental jurisdiction.[8] Indeed, in some cases, it is possible that no one court in

---

[7] *See, e.g.*, 15 U.S.C. §§ 15, 26 (claims under antitrust statutes); 15 U.S.C. § 78aa (claims under Securities Exchange Act); 28 U.S.C. § 1338(a) (claims under patent and copyright acts); 29 U.S.C. § 1132(e)(i) (certain claims under Employee Retirement Income Security Act); 42 U.S.C. § 9613(b) (claims under Comprehensive Environmental Response, Compensation, and Liability Act).

[8] *See* 28 U.S.C. § 1332; 28 U.S.C. § 1367.

the country would have jurisdiction over all claims that could be asserted by the class. Multiple class actions and duplicative litigation would thus be impossible to avoid.

In sum, the decision below calls into question the viability and finality of class action settlements which include a release of claims beyond the jurisdiction of the approving court. This will likely lead to a proliferation of burdensome class action litigation in any area of the law where one court does not have jurisdiction over all possible claims.[9] Simply put:

> To deny effect to a release of claims merely because it was given in an action commenced in state court would invite unprecedented consequences. Such a doctrine would unjustifiably proliferate litigation, defeat legitimate expectations of the settling parties, engender uncertainty among class members and defendants as to their ability to retain the benefits of settlements, discourage settlements altogether and create unwarranted conflict between state and federal courts.

Sandler, 818 F. Supp. at 705.

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[9] The House of Representatives has recently made clear its belief that even the existing system of securities class action litigation needs to be reformed in order to reduce wasteful and burdensome litigation. *See Securities Litigation Reform Act of 1995*, H.R. 1058, 104th Cong., 1st Sess. (1995) (passed by House of Representatives on March 8, 1995). The decision below will substantially exacerbate these problems.

CONCLUSION

For all of the above-stated reasons, as well as those stated in the Petition, this Court should grant certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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(7)

No. 94-1809

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORP.,

Petitioners,

vs.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 3, 1995
CERTIORARI GRANTED JUNE 19, 1995

BEST AVAILABLE COPY

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Notice of Pendency of Class Actions, Class Action Determination, Proposed Settlement of Class Actions, Settlement Hearing, Right to Request Exclusion and Right to Appear, dated October 27, 1992 ..... Pet. App. 77a

Memorandum Opinion, Order and Final Judgment of the Delaware Chancery Court in *In re MCA Inc. Shareholders Litigation*, dated February 16 and 22, 1993 ..... Pet. App. 63a

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV90-6451-R

LAWRENCE EPSTEIN, JOHN LINDER, JANE ROCKFORD, AS TRUSTEE OF THE MICHAEL J. ROCKFORD TRUST, MAURICE KARLIN, RUTH KARLIN, BETH ANN KARLIN, BERT P. KARLIN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

MCA, INC., MATSUSHITA ACQUISITION CORPORATION, MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORPORATION, SIDNEY J. SHEINBERG AND LEW R. WASSERMAN,

Defendants.

DOCKET ENTRIES

DATE	NR.	NO.	PROCEEDINGS
12/3/90	jcw	1.	Complt. Issd Summs. DEMAND FOR J/T.
			Case maybe ref'd to Mag King for discov.
12/10/90	esl	2.	ORD(JGD) to reassign case. Case reassign to the cal of Judge REAL for all fur procs. cc ptys Entered on Civil Courtran
12/7/90	lp	3.	Class actn, affidavit of Roger Kirby. pltf

DATE	NR.	NO.	PROCEEDINGS
		4.	Ex Parte applic for ord shortening ti. pltf LODGED ORD F(WD TO CRD)
		5.	Decl of Kaufman in suppt of ex parte. pltf
12/11/90	lp	7.	ORD allowing non-res atty to appear & des Robert H. Rotstein as lcl cnsl. def
		8.	ORD allowing non res atty Dennis Jacobs to appear & des Kay Kochenderfer as lcl cnsl. defts
12/14/90	lp	9.	Recpt for rptrs trnscrpt hrg of 12/11/90 c/r C. Knickerbocker.
12/18/90	lp	10.	Appendix subm unpub case not avail on lexis. defts MCA & Wasserman
		11.	Decl of Chapman in suppt of memo of p&A. defts Matsushita
		12.	Appendix of out of state authority. defts Matsushita
12/17/90	lp	13.	Decl of Kaufmann in suppt fo motn for S/J. pltf
		14.	Affidavit of Roger W. Kirby. pltf
		15.	memo of p&A in supt of motn for S/J. pltf
		16.	Notc of motn & motn for S/J. retnbl 12/28/90 @ 10 am. pltf
		17.	Appendix of unreported cases. pltf

DATE	NR.	NO.	PROCEEDINGS
		18.	Stmt of uncontroverted facts & concl of law. pltf
12/18/90		19.	Memo of P&A in litigation. defts MCA & Wasserman
		20.	Memo of P&A defts Matshushita
		21.	Memo re settlmnt of Delaware actn. pltfs
12/11/90	lp	22.	Suppl memo of p&A in suppt of ex parte applic for ord shortening ti. pltf
		23.	Joint memo of p&A in opp to ex parte. deft Matsushita
12/20/90	lp	24.	Decl of Jane Rockford in suppt of motn for S/J. pltf
		25.	Affidavit of Linder insuppt of-motnfor S/J. pltf
		26.	Decl of Karlin in suppt of motn for S/J. pltf
		27.	Decl of Karlin in suppt of motn for S/J. pltf
12/26/90	lp	28.	ANSWER to 1st A/C. deft MCA Inc & Wasserman
		29.	Notc of motn & motn to dism complt. defts MCA & Wasserman
12/20/90	lp	30.	Decl of Karlin in suppt of motn for S/J. pltf
		31.	Decl of Squire in suppt of motn for S/J. pltf

DATE	NR.	NO.	PROCEEDINGS
		32.	Decl of Karlin in suppt of motn for S/J. pltf
		33.	Reply memo of p&A in suppt of motn for S/J. pltf
12/27/90	lp	34.	Sur reply memo in suppt of motn for S/J. pltf
12/26/90		35.	Affidavit of Walter J. Minton.
		36.	Joinder in motn for S/J. pltf
12/27/90	lp	37.	ORD pltf shall promptly sver & file P/S.
		38.	Appendix of unreported authority subm in suppt of memo of P&A defts Matsushita Acquisition Corp. & Matsushita Holding Corp.
		39.	Decl of Edwards in suppt of opp to S/J motn & in suppt of motn to dism. defts Matsushita Acquisition Corp & Matsushita Holding
12/19/90	lp	40.	Decl of Hallam in suppt of memo of P&A re effect of class settlement defts MCA & Lew Wasserman
		41.	Notc of erratum. defts Matsushita Acquisition & Holding
		42.	Decl of Roddy in suppt of memo re settlmnt of consolidated actn pltfs for Delaware
12/27/90	lp	43.	Decl of Chapman in suppt of memo of p&A in opp to motn for S/J defts Matshushita Acquisition & Holding

DATE	NR.	NO.	PROCEEDINGS
		44.	Evidentiary objs. defts Matsushita Acquisiton & Holding
		45	Memo of p&A in opp to motn for S/J. defts Matsushita Acquisition
		46.	Opp to stmt of uncontroverted facts & stmt of gen issues. defts Matsushita Acquisition & Holding Corp.
		47.	Cert of svc, P/S of memo of P&A svd Kaufmann, Malchman, Greenberg & Ostrager by fed express & messenger & US Mail on 12/27/90 defts MCA & Wasserman.
		48.	Memo of p&A in opp to motn for S/J. defts MCA & Wasserman
12/27/90	lp	49.	Stmt of gen iss of material fact in response to stmt of uncontroverted facts. deft MCA & Wasserman
		50.	Appendix of decls. defts MCA & Wasserman
		51.	Appendix of unofficially reported or unreported authorities relied upon in opp to motn for S/J. defts MCA & Wasserman
12/28/90	lp	52.	ORD allowing non-res atty Paul Rowe to appear & des Robert H. Rotstein as lcl cnsl.
12/8/90	lp	53.	ORD allowing non-res atty Mary Kay Vyskocil to appear.
12/28/90	lp	54.	ORD allowing non-res atty Barry R. Ostrager to appear.

DATE	NR.	NO.	PROCEEDINGS
		55.	ORD allowing non-res atty Herbert M. Wachtell to appear.
		56.	Decl of James F. Shea. defts
		57.	Decl of Kaoru Takada. defts
1/2/91	lp	58.	ANSWER to First A/C. defts Matshushita Acquisition Corp & Matsushita Holding Corp
12/28/90	lp	59.	Hrg on pltfs motn for S/J joinders by J.Linder, J. Rockford M. Karlin R. Karlin B. Karlin & Bert Karlin denied as to cause of actn, ORD to prep ord/jdmt/findings. M.O. c/r V. Moran
1/7/91	lp	60.	Decl of Ernest Kaufmann. pltf
		61.	Stip & ORD cont hrg on motn to dism complt to 2/19/91 @ 10 am
12/17/90	lp	62.	Retn of orig sms& P/S of S/C svd Maureen Angelinetta for MCA Inc on 12/5/90 @ 9:06 am. pltfs
		63.	Affidavit p/S of s/c svd Ms. Ellen L. Kinsler for Matsushita Holding Corp on 12/10/90 @ 1:40 PM. pltfs
		64.	P/S of S/C svd Isabell Monroe for Matshushita Electric Industrial Co Ltd. pltfs
1/23/91	rm	65.	Affid of James P. Carroll, LR re proof of srv of S/C on Akiya Imura upon Miriam Ramos on 12/27/90 by pers srv. And proof of srv of A/C on Akiya Imura on 12/31/90 by cert mail. pltf

DATE	NR.	NO.	PROCEEDINGS
2/1/91	rm	66.	Declar of George M. Garvey re req for cont of hrg on mot to dism defts MCA, Inc. & Lew Wasserman
2/1/91	rm	67.	Stip & ORD (LEW) pltf's mot for part S/J cont'd to 3/18/91 10am. Opp papers shall be fi nlt 2/26/91; reply be fi nlt 3/11/91.
2/25/91	dc	68.	Decl of G.M. Garvey re req fr cont of hrg on mot to dism. deft
2/27/91	jcw	69.	Notc of x-mot And x-mot for lv to fi 2nd A/C, retnbl 3/18/91, 10a.m. pltfs LODGED PROP ORD (FW'D TO CRD) LODGED PROP 2nd A/C (FW'D TO CRD)
		70.	Appendix of unreported or unofficially reptd auths relied upon in suppt of pltf's oppos to deft Wasserman's Mot to dsms. Pltf
		71.	Declar of Peter S. Linden in suppt of Pltf's oppos to deft Wasserman's mot to dsms and in suppt of pltf's x-mot for lv to fi a sec A/C. pltf
		72.	Memo of p/a in oppos to deft Wasserman's mot to dsms and in suppt of pltfl's x-mot for lv to fi a sec A/C. pltf
3/1/91	gk	73.	MO: OSC re dismissal on 4/1/91 @ 11:00 am, to show cause why this actn should not be dismissed. C/R n/a.

DATE	NR.	NO.	PROCEEDINGS
2/28/91	bg	74.	Stip & ORD tht the mot of deft Lew R. Wasserman to dism the first a/c, currently sch for hrg on 2-19-91, 10:00am. be cont to 4-1-91, 10:00am. Opposing papers shall be fi & svd on 3-12-91 & reply papers shall be fi & svd on 3-25-91.
3/7/91	js	75.	Reqst to ent dflt. pltf
	js	76.	Declar of Ernest Kaufmann, re reqst to ent dflt. pltf
	js	77.	DEFLT BY CLERK to deft Matsushita Electric Industrial Co Ltd
03/11/91	r/s	78.	Memo P/A suppt motn class cert. pltf
		79.	Notc motn & motn class cert, rtbl 04-01-91, @ 10:00 AM. pltf LODGED Ord, (Fwd to CRD)
03/12/91	r/s	80.	ORDER allow apprnc non res atty Jeffrey H. Squire, by designatn of Ernest T. Kaufmann pltf
		81.	ORDER allow apprnc non res atty Roger W. Kirby by desig Ernest T. Kaufmann. pltf
03/18/91	r/s	82.	Joindr of dfts to motn class cert. dft MCA, Inc. & L.R. Wasserman
		83.	Memo P/A suppt opp ent dflt jdgmnt. dft Matsushita Electric
		84.	Dclar Brian L. Edwards suppt memo P/A. dft

DATE	NR.	NO.	PROCEEDINGS
		85.	Memo P/A opp motn class cert. dfts
03/19/91	r/s	86.	Dclar Miriam Ramos. dfts
		87.	Dclar Isabel Munro. dfts
		88.	Dclar Isabel Munro. dfts
		89.	Dclar Miriam Ramos. dfts
		90.	Dclar Isabel Munro. dfts
		91.	Dclar Isabel Munro. dfts
		92.	Dclar Miriam Ramos. dfts
		93.	Dclar Miriam Ramos. dfts
03/21/91	r/s	94.	Jnt rpt earl meet cnsl. pltf
03/25/91	r/s	95.	Rply memo suppt motn to Dism Complt. dfts
		96.	Rply memo P/A suppt motn class cert. pltf
03/28/91	r/s	97.	Stip & Order the req ent dflt is W/drawn, any dflt ent agnst MEI is set aside, & MEI shall hve 20 dys to fi answ.
4/1/91	dc	98.	MO:mot to dism is grantd w/20 days lv to amd. den mot fr class cert w/o prej.(GH)
4/—/91		99.	ANSWER to 1st A/C., dft. Matsushita Electric Industrial Co., Ltd.
4/22/91	r/s	100.	2nd A/C; dmnd j/t., pltfs ISSD smms on 2nd A/C.
04/23/91	r/s	101.	Stip & Order re: cnsolidatn of rlated cases & fi cnsolidatd amd Complt by 04-22-91.
04/26/91	r/s	102.	Notc depo Creative Artists agency.

DATE	NR.	NO.	PROCEEDINGS
			Inc. 05-10-91. pltf issd Subp.
		103.	Notc of Decision. pltfs
05/08/91	r/s	104.	Dclar George M. Garvey. dfts
05/09/91	r/s	105.	Stip & Order all dfts hve to/incl 05-20-91 to answ A/C; cnsl for dft Sidney Sheinberg hve accptd srvc of A/C.
05/21/91	r/s	106.	ANSWER to consolidated A/C. dfts Matshushita Acquisition Corp., Matshushita Holding Corporation, and Matshushita Electric Co., amd.
05/20/91	r/s	107.	Notc depo Creative Artists Agency., Inc. by Michael Ovitz on 07-01-91. pltfs Issd Subp.
		108.	Dclar Robert H. Rotstein. dfts
05/24/91	r/s	109.	Notc of PTC 07-29-91, @ 11:00 AM, Crtrm 8.; memo cntntns fact & law shall be fi/srvd by 07-08-91; PTC shall lodge by 07-22-91; trl dte set 08-27-91, @ 09:00 AM.
		110.	Notc of Motn & motn to Dism., rtbl 07-01-91, @ 10:00 AM. dfts
05/29/91	r/s	111.	Stip & order dfts MCA INC., Lew R. Wasserman & Sidney J. Sheinberg hve to/incl 05-24-91 to answ A/C.
		112.	Notc change dte for hrng motn dism, rtbl 07-01-91, 10AM., dfts
		113.	Correctn to Notc of Motn & motn Dism. dft
06/11/91	r/s	114.	P/S of Notc of Motn to dism. dfts

DATE	NR.	NO.	PROCEEDINGS
06/07/91	r/s	115.	Notc of Motn & motn Dism, rtbl 07-01-91, @ 10:00AM. dfts
06/11/91	r/s	116.	Ord allow apprnc non-res atty Robert J. Bennett by desig Lawrence M. Berman. pltf
06/13/91	r/s	117.	Notc of erratum re memo P/A suppt motn dism. dfts
06/14/91	r/s	118.	Ex-Prte Applic for Ord cont hrng defts motns. pltf LODGED Ord.
		119.	Dclar Ernest T. Kaufmann suppt exprte applic cont hrng dft motn pltf.
		120.	Dclar Roger W. Kirby suppt exprte applic. pltf
		121.	Memo opp exprte applic for ord cont hrng dft motns. dfts
		122.	Dclar Robert H. Rotstein suppt memo opp exprte applic. dfts
		123.	Memo P/A opp exprte applic for Ord cont hrng defts motns. dfts
6/18/91	jcw	124.	Declar of Theodore N. Mirvis in oppos to pltfs' Ex parte applic. defts
		125.	Suppl declar of Robert S. Chapman in suppt of oppos to pltf's ex parte applic for ord cont hrg on defts' mots. defts
6/19/91	jcw	126.	Declar of Paul Curnin concerning the availability of Matsushita wits. defts
6/19/91			PLACED IN FILE NOT USED ord granting pltfs' ex parte applic.

DATE	NR.	NO.	PROCEEDINGS
6/24/91	jcw	127.	Appendix of unreported or unofficially reported auths in suppt of pltf's memo of p/a in oppos to the mots by all defts dsms all or portions of the complt. pltfs
6/21/91		128.	Memo of p/a in oppos to mot of MCA, Inc, Lew Wasserman, et al. to dsms compl.t pltf W. Minton
6/18/91	esl	129.	MO: C/R-Edith Schwartz HRG pltf's ex parte applic to cont hrg on mot to dism. Denied as to cause of actn w/ or w/o prej & to be personally srvd. Set fur hrg on 6-19-91 re depos U.S.A./Japan
6/19/91	esl	130.	MO:C/R-Schwartz. HRG: fur hrg re pltf's ex parte to cont hrg on mots to dism; stat of depos USA/Japan. Declr not satisfactory; Depo Herrata due 6-24-91, 9AM. in pltf's office; Taka on 7-9-91, 9AM. pltf's off opp due 6-20-91; svc Saturday; reply 6-25-91.
6/25/91	gk	131.	Reply memo of p's & a's in suppt of motn of Defts Wasserman and Sheinberg to dismiss pltfs' complt. Defts MCA Inc., Lew R. Wasserman and Sidney J. Sheinberg
6/25/91	gk	132.	Reply memo of p's & a's in fur suppt of Matsushita Defts' motn to dismiss. Defts, Matsushita Acquisition Corp., Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corp.

DATE	NR.	NO.	PROCEEDINGS
6/28/91	esl	133.	Receipt for Reptr's transc had on 6-19-91. Fld orig reptr's transc procdngs had on 6-19-91.
		134.	Receipt for Reptr's transc had on 6-18-91. Fld orig reptr's transc procdngs had on 6-18-91.
6/27/91	esl	135.	ORD on oSC re dismissal; consolidation of cases for trial CV90-6451 R & CV91-0336 R (Gx) was hld on 4-29-91.
7/5/91	mc	136.	Expart Appli to Continue Pre-Trial & Trial Dates - Pltfs.
7/5/91	mc	137.	Decl of Ernest T. Kaufmann in Support of Expart Appli to Continue Pre-Trial & Trial Dates - Pltfs.
7/5/91	mc	138.	Objections to Proposed Ord Granting Motns to Dismiss - Pltf.
7/3/91	mc		LODGED Order Granting Motns to Dismiss - Defts.
7/1/91	mc	139.	MO: Motn to Dismiss - Crt ords motns: granted as to cause of action above motns; no private right action; & dismiss w/predj; ords pltf to prepare ord/judgt/findings. (C/R jc)
07/11/91	r/s	140.	Rspnse to objectns to prop[illegible]d to objectns to form. dfts
07/09/91	r/s	141.	Opp to exprte applic to cont PT trl dtes. dfts

DATE	NR.	NO.	PROCEEDINGS
		142.	Dclar Ernest T. Kaufmann suppt objectns to form. pltf
		143.	Objectns to form of ord propsd by Matsushita dfts.pltf
		144.	Rspnse to exprte applic to cont. dfts
		145.	Rspnse to objectns to propsd Ord. dfts
06/24/91	r/s	146.	Memo P/A opp motns to dism. pltfs FILED UNDER SEAL.
		147.	Dclar Roger W. Kirby. pltfs FILED UNDER SEAL.
08/01/91	r/s	148.	Notc depo Price Waterhouse 08-26-91. pltf
08/09/91	r/s	149.	Notc depo David Geffen 08-26-91. pltf Issd 01 subp.
08/12/91	r/s	150.	Dclar Ernest T. Kaufmann suppt motn class cert. pltf
		151.	Appendix unreported cases relied upon suppt motn class cert. pltf
		152.	Memo P/A suppt motn class cert. pltf
		153.	Notc motn & motn class cert. rtbl 09-03-91, @ 10:00 AM. pltf. LODGED ord, (Fwd to CRD)
08/13/91	r/s	154.	ORDER the Complts in the cnsolidated case, DISM w/out lv to Amd; Jdgmnt may ent dism actns w/prej; this ord does not dism claims alleged agnst dfts Matsushita under Sect 10(b), 14(d) and 14(e) of

DATE	NR.	NO.	PROCEEDINGS
			Securities Exchange Act of 1934 and Rule 14d-10 to promulgated thereunder., [Ent 08-14-91]
		155.	ORDER pltf exprte applic GRANTED; PTC cont 09-16-91, @ 11:00 AM;
08/20/91	r/s	156.	Memo P/A opp motn class cert. dfts
08/23/91	r/s	157.	Objectns to form jdgmnt propsd by Matsushita. pltfs
08/26/91	r/s	158.	Memo cntntns law/fact. pltf
		159.	Notc of lodging depo. pltf LODGED depo.
		160.	Wit list. pltf
		161.	Exhib list. pltf
		162.	Memo cntntns law/fact . pltf
08/27/91	r/s	163.	Memo cntntns fact/law. dfts
		164.	Jnt exhib list. dfts
		165.	Wit list. dft
		166.	Wit list. pltf W. Minton
		167.	Dclar Kaufmann suppt motn class cert. pltf
08/27/91	r/s	168.	Rply memo P/A suppt motn class cert. pltf
08/27/91	r/s		fndgs re jdgmnt purs to FRCP 54(b). defts PLACED IN FI NOT USED. jdgmnt PLACED IN FI NOT USED.

DATE	NR.	NO.	PROCEEDINGS
08/29/91	r/s	169.	Notc errata re opp class cert motn. dfts
08/30/91	r/s	170.	Ex-prte applic to cont PTC. dfts LODGED Ord, to CRD
09/04/91	r/s	XX	Ord certifyng pltf class PLACED IN FI NOT USED.
09/03/91	r/s	171.	MO: pltf motn class dert DENIED. George Haas
09/04/91	r/s	XX	propsd ord cont PTC. dft PLACED IN FI NOT USED.
09/06/91	r/s	172.	MO: PTC cont 10-15-91, ,, n/r
		173.	ORDER DENYING motn for class cert. dfts
09/16/91	r/s	174.	objectns to form of ord propsd by Matsushita dfts.pltfs
09/23/91	r/s	175.	Notc of Motn & motn for S/Adjudicatn iss's, rtbl 10-15-91, @ 10:00 AM., pltf LODGED-stmnt & S/J, to CRD
		176.	Memo P/A suppt motn S/J. pltf
		177.	Dclar Peter R. Dion Kindem suppt motn S/J. pltf
10/01/91	r/s	178.	MO: all motns and PTC cald for 10-15-91 are cont 10-24-91., n/r
		179.	Appendix of unofficially rptd authority & SEC rleases in opp motn S/adjudicatn. dfts
		180.	Dclar Brian L. Edwards & req judicl Notc suppt opp pltf motn S/adjudic. dfts

DATE	NR.	NO.	PROCEEDINGS
10/02/91	r/s	181.	Dclar Paul C. Curnin opp pltf motn S/adjudic. dfts
10/04/91	r/s	182.	Rply memo P/A suppt motn S/adjudicatn iss's. pltf
10/07/91	r/s	183.	Rply memo P/A suppt joindr motn S/adjudic iss's. pltfs
		184.	Joindr of class pltfs in motn S/adjudic iss's. pltfs
10/11/91	r/s	185.	Notc of Motn & motn cmpl dosc, rtbl 11-04-91, @ 10:00 AM. dft
		186.	Stmnt purs LR 7.15.2. dfts
		187.	Notc of Motn & motn for lv to fi 2nd A/C. pltfs LODGED Ord to CRD.
		188.	Memo P/A suppt motn lv to fi 2nd A/C. pltf
		189.	MO: motns & PTC cont to 11-04-91, @ 11:00 AM. n/r
		190.	Dclar Mary Kay Vyskocil. dfts
10/15/91	r/s	191.	Notc of Motn & motn for S/J., rtbl 11-04-91, @ 10:00 AM. dfts
			LODGED stmnt & jdgmnt to CRD.
10/17/91	r/s	192.	Dclar Ernest T. Kaufmann suppt ex-prte applic cont hrng certain motns of Matsushita dfts. pltfs
		193.	Exprte applic to cont hrng on certain motns Matsushita dfts. pltfs LODGED Ord to CRD.

DATE	NR.	NO.	PROCEEDINGS
10/18/91	r/s	194.	Memo P/A opp pltf exprte applic. dfts
		195.	Dclar Nancy L. Luis. dfts
		196.	Dclar Gerald L. Sauer. dfts
10/21/91	r/s	197.	Stmnt gen iss opp motn S/J. pltf
		198.	Dclar Peter R. Dion Kindem opp motn S/J. pltf
		199.	Memo P/A opp motn S/J. pltf
		200.	Dclar Walter Minton opp motn S/J. pltf
		201.	Objectns to dclar Gerald L. Sauer and exhibs suppt motn S/J., pltf
10/22/91	r/s	202.	Dclar Peter S. Linden opp dft motn S/J. pltf FILED UNDER SEAL
10/17/91	r/s	203.	ORDER exprte applic cont hrng motns DENIED. pltfs
10/21/91	r/s	204.	Dclar Mary Kay Vyskocil. dfts
		205.	Dlcar Gerald L. Sauer. dfts
10/22/91	r/s	206.	Dclar Peter S. Linden opp motn cmpl disc. pltf
		207.	Appendix unreptd authorities opp motn S/J. pltf
		208.	Memo P/A opp motn S/J. pltf
		209.	Opp stmnt uncntrovrtd facts & stmnts gen iss opp motn S/J. pltf
		210.	Memo P/A opp motn cmpl disc. pltf

DATE	NR.	NO.	PROCEEDINGS
10/24/91	dc	211.	Notc of errata re deft memo P&A in opp to pltf mot fr lv to fi 2nd consolid a/c. defts
10/25/91	dc	212.	Decl of Gerald L. Sauer re lodging of excerpts frm depo transcrpts of Pamela Seymon Esq & Martin Lipton Esq in suppt of Matsushita defts' mot fr s/j deft
10/28/91	dc	213.	Proof of svc of pltf cross mot & cross mot to strike hearsay portns of defts' mot fr s/j & relatd docs;svd on attchd svc list on 10-23-9l.pltfs
		214.	Repl memo P&A in suppt. of mot fr lv to fi 2nd consolid a/c.pltfs
		215.	First and joint exh list.defts
		216.	Decl of Peter S. Linden in suppt of class pltfs' mot fr lv to fi 2nd consolid a/c.pltfs
		217.	Objs to the graphic material subm by the Matsushita defts. pltf Minton.
		218.	Decl of Brian L. Edwards in suppt of Matshushita mot to compel discov. defts
		219.	Memo P&A in suppt of mot to strike pltf repl memo in suppt of jndr. defts
		220.	Repl memo P&A in suppt of mot to compel discov & to strike pltf memo in opp. Matshsuita defts
		221.	Repl memo P&A in suppt of deft mot fr s/j.Matsushita defts.

DATE	NR.	NO.	PROCEEDINGS
10/29/91	dc	222.	Notc of tkng mot fr lv to fi 2nd amd consolidt cmplt off cal.pltf.
		223.	Decl of E.T. Kaufmann in suppt of pltf suppl memo. pltf
		224.	Suppl memo in opp to deft mot to compel discov.pltf
		225.	Decl of E.T. Kaufmann re lodgng of excerpts frm depo transcrpt of Martin Lipton Esq in opp to Matsushita defts' mot fr s/j. pltf
10/25/91	esl	226.	Notc of mot & mot of David Geffen for a protective ord, to quash subpoena & for sanctions, retbl 11-18-91, 10AM. Non-pty Geffen
			LODGED prop ORD. (Fwd'd to CRD)
10/29/91	esl	227.	Declr of Paul C. Curnin. defts
		228.	Separately stated objections to pltfs' exhibits. defts
		229.	Notc of errata re reply memo of P/A of defts in supprt of defts' mot for S/J. defts
11/1/91	ca	230.	Memo in connection with pltfs notc of w/drawal of motn for lv to file a consolidated amended complt & in connection with pltf Minton's notc of flg of related case. defts.
11/4/91	ca	231.	Corrected version of memo in connection with Pltfs notc of w/drawal of motn for lv to file a consolidated amended complt & in connection with pltf Minton's notc of flg of related case. dfts

DATE	NR.	NO.	PROCEEDINGS
11/1/91	ca	232.	Obj's to defts Graphics. pltfs.
11/5/91	tlt		PIFNU prop final ord grntng motn S/J, stmnt uncntrovrtd facts/cnclus law,dfts stmnt uncntrovrtd facts cnclusns law, Ord grntng pltf x-motn strike hearsay prots dfts motn S/J. pltfs
10/31/91	ca	233.	Obj's to graphic evid. dfts
10/25/91	r/s	234.	Jnt stip to cmpl David Geffen testify at depo, prod docs & for snctns; etc.
		235.	Notc of motn & motn to cmpl David Geffen appr tstify at depo, pltf LODGED Ord, to CRD.,
10/28/91	r/s	236.	P/S of x-motn, etc. pltfs
11/12/91	r/s	237.	Suppl memo suppt motn cmpl tstmny at depo. pltfs
11/04/91	r/s	238.	MO: Epsteins motn lv w/d; Mintion's motn S/J DENIED; Matsushita motn S/J DENIED; Matsushita motn cmpl GRANTED, excpt #3 and part of #2 limited to past taxes for 5 yrs. Lois Anderson.
11/13/91	r/s	239.	correctd pages 10 and 12 of Notc motn & motn protect ord. dfts.
11/15/91	r/s	240.	Notc of Motn & motn for Protect Ofd, rtbl 12-09-91, @ 10:00 AM, dfts
		241.	Dclar Mary Kay Vyskocil suppt motn protect Ord. dfts
		242.	P/S for Notc of Motn protect Ord. dfts

DATE	NR.	NO.	PROCEEDINGS
		243.	P/S for dclar Mary Kay Vyskocil. dfts
11/18/91	r/s	244.	MO: D. Geffens motn protect Ord to quash subp & for snctns: Crt Ords Geffen to appr for two hrs on dte to be set by ptys, C/R Julie Churchill
11/19/91	rm	245.	ORD Geffen s/appear & testify at ddpos to be tkn by pltfs on a date agreed 30 days of this ord, tkn at offices of pltfs cns & shall not exceed 2 hrs. Geffen s/produce nlt 10 days prior to depos the docs, papers & things described in the subp d/t; the x-mot of Geffen for a protective rod, to quash the subp srvd on him for sanctions is DENIED.
11/19/91			--PIFNU Prop ord granting mot of D. Geffen for a protective ord, to quash subp & for sanctions.
11/22/91	r/s		PLACED IN FI NOT USED - Ord grntng S/adjudic iss's. pltf
		246.	Notc of Motn & motn for lv to fi 2nd A/C, rtbl 12-16-91, @ 10:00 AM. pltfs LODGED Ord & 2nd A/C to CRD.
		247.	Memo P/A suppt motn lv to fi 2nd A/C. pltf
		248.	Memo opp motn protect Ord re Ohashi & suppt x-motn strike. pltf

DATE	NR.	NO.	PROCEEDINGS
		249.	Dclar Roger W. Kirby opp motn protect Ord . pltf
11/25/91	r/s	250.	Notc of motn & motn cmpl disc, rtbl 12-16-91, @ 10:00 AM. dft
		251.	Dclar Joseph M. McLaughlin. dfts
		252.	Dclar Barry R. Ostrager. dfts
		253.	Ex-Prte Applic for ord short ti for Notc of Motn for Ord enjoin pltfs frm cmmencing furth lawsuits arisng out of MCA Acquisitn w/out lv of crt. dfts LODGED Ord to CRD.
		254.	Notc of Motn for entempt Ord & snctns. rtbl 12-16-91, @ 10:AM, dfts LODGED Ord to CRD.
		255.	Dclar Paul C. Curnin suppt motn contempt Ord & snctns. dfts
		256.	Ex-Prte Applic for Ord short ti for Notc motn cntmpt Ord & snctns. dfts LODGED Ord to CRD.
		257.	Memo suppt motn Ord enjoin pltfs. dfts
		258.	Notc of Motn Ord enjoin pltf cmmencng furth lawsuits MCA w/out lv of crt, rtbl 12-16-91, @ 10:AM. dfts LODGED Ord to CRD.
10/31/91	r/s	259.	Notc of fi of rlatd case. pltf

DATE	NR.	NO.	PROCEEDINGS
11/27/91	r/s	260.	Ex-Prte ORDER Matsushita dfts motn for cntempt Ord & for snctns shall be hrd 12-09-91, @ 10:00 AM, Crtrm 8; Furth Ord pltf hve to/incl 05:00 PM 12-02-91 to fi/srv pprs opp to motn; Matsushita dfts hve up to/incl 12-06-91, @ 05:00 PM to fi/srv rply pprs; all opp & rply pprs shall be srvd pers serv on dte they fi. dft
		261.	Ex-Prte ORDER Matsushita dfts motn for Ord enjoin pltfs & their cnsl frm Commencing Furth Law-suits arisng out of the MCA Ac-quisition w/out lv of crt shall be hrd 12-09-91, @ 10:00 AM, Crtrm 8; pltfs shall hve to/incl 05:00 PM 12-02-91 to fi/srv opp to motn;dfts 05:00 PM 12-06-91 fi/srv rply. dfts
12/02/91	r/s	262.	Memo P/A opp motn citation of cntempt & snctns . pltf
		263.	Appendix unrptd unofficially rptd cases rlied upon in opp to motn en-join pltfs & their cnsl furth law-suits., etc. pltf
		264.	Memo P/A opp, applic Ord enjoin-ing pltfs frm commencing furth law-suits., etc. pltf
		265.	Memo opp dfts motn seekng cmpl addtl disc. pltf
		266.	Dclar Peter S. Linden opp motn seekng cmpl addtl disc. pltf

DATE	NR.	NO.	PROCEEDINGS
		267.	Dclar Peter S. Linden opp motn ci-tation entempt & snctns. pltfs
12/05/91	r/s	268.	Dclar Ernest T. Kaufmann opp motn protect Ord re depo Ohashi., pltf
12/03/91	r/s	269.	Dclar Barry R. Ostrager opp motn lv to Amd & for snctns . dfts
12/02/91	r/s	270.	Rply memo suppt motn protect Ord. dfts
		271.	Memo P/A opp motn lv to fi 2nd A/C. dfts
12/06/91	r/s	272.	Memo P/A suppt motn fi A/C. pltf
		273.	Notc of Motn & motn for Ord grntng lv to fi 1st A/C, rtbl 01-06-91, @ 10:00 AM. pltf LODGED Ord & A/C to CRD.
		274.	Dclar Peter R. Dion Kindem suppt motn. pltf
		275.	Rply memo suppt motn for cntempt ord & snctns. dfts
		276.	Stip & Protect Ord.
		277.	Rply memodfts suppt motn Ord en-joing pltf. dfts
		278.	Rply memo P/A suppt motn cmpl disc. dfts place in fi not used - ex-prte Ord short ti for notc motn cntempt place in fi not used - propsd exprte Ord short ti for Notc of Motn for Ord enjoining pltfs. dfts
12/09/91	r/s	279.	Dclar Paul C. Curnin suppt motn cntempt Ord snctns. dfts

DATE	NR.	NO.	PROCEEDINGS
		280.	Dclar Paul Curnin suppt motn cmpl disc. dfts
		281.	Rply emmo P/A suppt motn lv fi A/C. pltf
		282.	Dclar Roger W. Kirby suppt motn lv to fi A/C. pltf
		283.	Appendix unrprtd cases. pltf
12/09/91	r/s	284.	MO: Matsushita motn enjoining pltfs & cnsl frm commencing lawsuits re MCA acquisition GRANTED; depo of Masao Ohashi to be tkn in Japan; motn for contempt Ord & snctns cont 01-13-92; pltf cnsl Ord prod inventry of req by 12-17., Verna Moron
12/11/91	r/s	285.	Objectns to form of Ord propsd by Matsushita dfts. pltf
12/10/91	r/s		place in fi not used - propsd cntmpt Ord & for snctns. dfts
12/16/91	r/s	286.	MO: pltf motn lv to fi 2nd A/C DENIED; Matsushita motn cmpl disc GRANTED. Richard Fischer place in fi not used - Ord grntng lv to fi 2nd A/C.
12/17/91	r/s	287.	Dclar Ernest T. Kaufmann re inventory of docs prod by dfts. pltf FILED UNDER SEAL.
12/17/91	r/s	288.	ORDER dfts motn cmpl disc GRANTED; the Matshushita dfts shall rcovr atty fees & costs incurred in mkng this motn. place in fi not used - 2nd cnsolidatd A/C; dmnd j/t. pltf

DATE	NR.	NO.	PROCEEDINGS
		289.	Rspnse to objectns to form of Ord enjoin. dfts
		290.	Notc of Motn & motn for Ord cnsolidatng case. rtbl on 01-21-92, @ 10:00 AM. pltf
12/23/91	esl	291.	Declr of Barry R. Ostrager in opp to pltf's mot for lv to amend & for sanctions. defts
12/18/91	esl	292.	Objections of pltf to prop Ord enjoining pltfs & their cnsl frm commencing fur lawsuits arising out of the MCA Acquisition w/o lv of crt. pltf
12/19/91	esl	293.	Objections to form of revised Ord prop. pltfs
12/18/91	esl	294.	Objections of pltf to prop Ord denying Epstein pltfs' mot for for lv to amend complt. pltf
12/20/91	esl	295.	MO:(n/r) This case has been reset for PTC on 1-27-92, 11AM. & trial on 2-11-92, 9AM. Memo of contentions of fact & law shall be fld & srvd on or bef 1-6-92; PTC Ord shall be lodged w/ the Crt on or bef 1-21-92.
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12/23/91	esl	296.	MO:(n/R) Crt ORD tht on the crt's own mot the scheduled for hrg on the cal of this Crt on 1-6-92 is cont'd to 1-13-92, 10AM. NOTE: replies due 12-30-91, no extensions.
12/24/91	esl	297.	Notc of mot & mot of pltfs for voluntary dismssl w/ prej; memo in supprt of mot for voluntary dismssl w/ prej, retbl 1-13-92, 10AM. pltfs

DATE	NR.	NO.	PROCEEDINGS
		298.	Declr of Irving Malchman in supprt of Karlin pltfs' mot for voluntary dismssl w/prej. ptlfs.
12/26/91	tlt		PIFNU Ord enjoining pltf frm commencing further lawsuits arising out of the MCA acquistion w/o further leave of crt. pltf
12/30/91	jcw	299.	Memo of p/a in resp to mot of pltfs for vol dmsl w/prej. deft
		300.	Declar of Mary Kay Vyskocil in resp to mot of pltfs for vol dsmsl w/prej. defts
		301.	Reply memo of p/a in suppt of pltf Walter Minton's mot to fi 1st A/C. Pltf
		302.	Declar of Peter S. Linden in suppt of pltfs' mot to compel discovery. pltfs
		303.	Jnt statemnt purs to L.R. 7.15.2 re mot of pltfs to compel discovery. pltfs
			LODGED PROP ORD. (FW'D TO CRD)
		304.	Notc of mot and mot for Ord compelling discov, retbl 1/13/92, 10a.m. Pltfs
01/06/92	r/s	305.	Suppl dclar Ernest T. Kaufmann re:. inventory docs produced to Matsushita dfts. pltfs FILED UNDER SEAL.
01/07/92	r/s	306.	Suppl memo suppt motn cmpl disc. pltf

DATE	NR.	NO.	PROCEEDINGS
		307.	Dclar Ernest T. Kaufmann suppt motn cmpl disc. pltf
		308.	Suppl dclar Ernest T. Kaufmann suppt motn cmpl disc. pltf FILED UNDER SEAL.
12/20/91	r/s		placed in fi not used-- Ord denyng pltf motn lv A/C. dfts
12/30/91	r/s	309.	ORDER pltfs may tke depo of Ohashi in Japan. pltf
		310.	ORDER enjoin pltf & cnsl frm commencing furth lawsuits arising out of MCA Acquisition w/out lv of crt. dfts. placed in fi not used-- Rvsd Ord enjn pltf & cnsl frm commencing furth lawsuits arising out MCA Acquisition w/out lv of crt.
		311.	ORDER enjoin pltfs & cnsl frm commencing furth lawsuits arisng out of MCA Acquisition w/out lv of crt. dfts
01/06/92	r/s	312.	Memo cntntns law/fact. pltf Minton
		313.	Memo cntntns fact/law purs LR 9.5. pltf
		314.	Rply dclar Irving Malchman suppt Karlin pltfs motn vol dism. plft
01/07/92	r/s	315.	Wit list. pltf Minton
01/08/92	r/s	316.	Dclar Paul C. Curnin opp motn cmpl disc. dfts
01/10/92	r/s	317.	Notc of Motn & motn for Ord cmpling prod docs, rtbl 01/21/92, @ 10:00 AM. pltf
		318.	Rply dclar Peter S. Linden suppt motn cmpl disc. pltf

DATE	NR.	NO.	PROCEEDINGS
		319.	1st rvisd jnt exhib list.
		320.	Dclar Walter Minton opp motn dism. pltf
		321.	jnt stmnt re motn cmpl furth prod docs. pltf
01/15/92	r/s	322.	2nd suppl dclar Ernest T. Kaufmann. pltf FILED UNDER SEAL.
01/13/92	r/s	323.	MO: Karlin pltfs motn for vol dism w/prej GRANTED, but not DISM frm iss of cntempt & for snctns; pltf motn cmpl off-cal forfail to meet/cnfer/ Drt DENIES W. Minton motn for lv to fi 1st A/C; Matsushita motn DISM GRANTED; no ruling on snctns. C/R Lena Van Smith
01/15/92	r/s	324.	Dclar Peter S. Linden suppt motn cmpl disc. pltf
		325.	Dclar cnsl re non coop. pltf
		326.	Rvisd wit list. pltf
		327.	Notc of Motn & motn for Ord cmpllng disc. rtbl 02-03-92, @ 10:00 AM. pltfs LODGED Ord to CRD.
		328.	Jnt stmny purs LR 1.15.2 re motn cmpl disc. placed in fi not used - Ord grnt lv fi 1st A/C. pltf placed in fi not used - 1st A/C; dmnd j/t. pltf placed in fi not used - Ord grntng pltf motn cmpl disc.
01/16/92	r/s	329.	Correctd notc of motn to cmpl prod docs. rtbl 01-27-92, @ 10:00AM., plt

DATE	NR.	NO.	PROCEEDINGS
01/17/92	r/s	330.	Objectns to propsd Ord denying pltf motn lv A/C. pltf
		331.	Objectns to form of Ord propsd by Matsushita dfts dism Karlin pltfs. pltfs
		332.	Notc of Motn & motn for Ord cmpllng prod cert docmnts w/hld by Matsushita dfts., rtbl 02-03-92, @ 10:00 AM. pltfs LODGED Ord
		333.	Dclar Peter S. Linden suppt motn cmpl prod cert docs. pltfs
		334.	Jnt stmnt re motn pltf cmpl prod cert docs w/hld. pltfs
		335.	Notc of Motn & motn to intervene in actn. rtbl 02-10-92,@ 11:00 AM. David & Andrew Minton LODGED Complt Intervene.
01/08/92	r/s	336.	Dclar Peter S. Linden re: suppl inventory docmnts prod by pltf to Matsushita dfts. pltfs FILED UNDER SEAL.
01/21/91	r/s	337.	Objectns to addtl graphic pltf.
		338.	Objectns to exhibs. pltf
01/22/92	r/s	339.	Dclar Paul C. Curnin Opp motn cmpl disc. dfts
01/28/92	r/s	340.	Suppl memo suppt motn Ord cmpllng prod docs w/hld. pltfs
01/29/92	r/s	341.	Suppl dclar Ernest T. Kaufmann suppt motn cmpl. pltf
		342.	Suppl memo suppt motn cmpl disc. pltfs

DATE	NR.	NO.	PROCEEDINGS
		343.	Dclar Joseph M. McLaughlin suppt motn limine exclude evid. dfts
		344.	Memo P/A suppt motn limine exclude. dfts
		345.	Memo P/A suppt motn limine exclude evid. dfts
		346.	Dclar Joseph M. McLaughlin suppt motn limine. dfts
		347.	Memo P/A suppt motn limine exclude evid. dfts
		348.	Dclar Joseph M. McLaughlin suppt motn quash subp. dfts
		349.	Memo P/A suppt motn quash trl subp. dfts
		350.	Trl brf. pltf Minton
		351.	Wit list. pltf Minton
		352.	Stmnt fact/law. pltf Minton
		353.	Exhib list. pltf Minton
		354.	Pre-trl Ord. pltfs Minton
		355.	Dclar Paul C. Curnin opp motn cmpl disc. dfts
01/28/92	r/s.	356.	ORDER the Karlin pltfs indiv claims vol DISM w/prej; this dism does not affect the comtempt of pltf., [Ent 01-30-92]
01/31/92	r/s	357.	Dclar Peter S. Linden opp dfts motn S/J. pltf FILED UNDER SEAL

DATE	NR.	NO.	PROCEEDINGS
1/22/92	am	358.	Declrn of Paul C. Curnin in opp to motn to compel discvy. dfts
		359.	Declrn of Paul C. Curnin regard'g PTC Ord. dfts
01/23/92	am	360.	Revised objs to dfts Graphics. ptlfs
01/27/92	am	361.	Declrn of Ernest T. Kaufmann in opp to dfts ex parte appl for Ord shorten'g ti. pltfs
01/29/92	am	362.	List of depons excerpts. pltf
		363.	Stmt of factual legal issues. dfts
		364.	Reply memo of P/A of David & Andrw Minton in suppt of motn to intervene. pltfs
01/31/92	r/s	365.	Notc lodging depos. pltf
		366.	Stmnt fact/legl iss's. pltf
		367.	Trl brf. pltf
		368.	Stmnt re limine motns. pltf
		369.	Memo opp dft limine motns. pltf
		370.	Dclar Peter S. Linden suppt motn limine. pltf
		371.	Limine motn rcnsidratn crt ruling 'Ohashi' & snctns. pltf
		372.	Submissn rspnse to crts directn re fi motns limine. pltf
		373.	Stmnt gen iss's opp motn S/J. pltf
		374.	Opp motn limine re dtrmnatn price. pltf

DATE	NR.	NO.	PROCEEDINGS
		375.	Memo P/A opp dfts 5th motn S/J; x-motn. pltfs
		376.	Opp to stmnt uncntrovrtd facts/ stmnt gen iss opp motn S/J. pltf
		377.	Appndx unrptd unofficially rptd authrits rlied upon suppt of class pltf opp to Matsushita dfts motn S/J. pltfs
		378.	Objectns to dclar Gerald L. Sauer & exhibs suppt motn S/J. pltf
		379.	Dclar Peter R. Dion Kindem opp motn S/J. pltf
		380.	Memo P/A opp motn S/J. pltf
02/03/92	r/s	381.	MO: furth hrng motn cmpl 02-10-92; list docs due 02-06-92; Crt DENIES privileged issue; crt hears motn limine & GRANTS how Matsushita reached price; valuatn of MCA by non-ptys; & SEC investigatn; DENIED rcnsidratn Ohassi., C/R Lois Anderson
		382.	Dclar Paul C. Curnin suppt dft motn limine exclude evid. dfts
		383.	Amd dclar Josph M. McLaughlin suppt motn quash trl subp. dfts
02/04/92	r/s	384.	Req voir dire questns. pltf Minton
02/04/92	r/s	385.	Req j/instr. pltf Minton
		386.	Req for J/instr
		387.	Correctd exhib list. Class pltfs

DATE	NR.	NO.	PROCEEDINGS
		388.	Objectns to propsd Ord denying pltf motn cmpl disc. pltf Minton
		389.	Rply memo P/A furth suppt motn S/J. dfts
02/05/92	r/s	390.	Objectns to form of Ord propsd by Matsushita dfts re motn cntmpt. pltfs
02/06/92	r/s	391.	Memo P/A opp motn limine re measure of dmages. pltf
		392.	Dclar Peter R. Dion Kindem opp motn. pltf
		393.	Suppl memo P/A Minton opp dft motn S/J. pltf
		394.	Objectns to dclar Paul Curnin & exhibs. pltf
		395.	Dclar Barry R. Ostrager purs directn Ord 02-03-92. dfts Matsushita
		396.	P/A opp limine motn preclude tstmny R. Stone. pltf
		397.	Notc mrkng depos. pltf
02/07/92	r/s	398.	Objectn of Sidney J. Sheinberg to trl subp to Price Waterhouse & Krieger.
		399.	Memo P/A suppt exprte applic quash subp. 3rd pty wit Krieger
		400.	Dclar srvc by mail of exprte applic. Krieger

DATE	NR.	NO.	PROCEEDINGS
		401.	Ex-Prte Applic quash subp. 3rd pty Wit Grieger & Price Waterhouse LODGED Ord.
		402.	Dclar Maurice Karlin Cncerning 11-04-91 ruling. pltfs
		403.	Dclar Jane Rockford. pltf
		404.	Dclar John Linder. pltf
		405.	Dclar Lawrence Epstein cncrning 11-04-91 ruling. pltf
		406.	Dclar Ernest T. Kaufmann re dfts motn cntrmpt & snctns. pltf
		407.	Furth memo opp motn cntempt. pltf
		408.	Objectns to propsd form of verdict. pltf
		409.	Dclar Beth Ann Karlin cncern 11-04-91 ruling. pltf
		410.	Dclar Bert P. Karlin. pltf
		411.	Opp exprte applic quash subp, etc. pltf
		412.	Ex-Prte Applic for Ord providng srvc of trl xubp. pltf LODGED Ord.
		413.	Dclar Ernest T. Kaufmann suppt ex-prte applic. pltf
02/11/92	r/s	414.	ORDER the motn for vol DISM w/prej of Karlin pltfs Complt GRANTED, excpt that the Karlin pltfs are not dism frm actn w/rspect to motn for cntempt prev fi by Matsushita dfts., [Ent 02-12-92] mld cpys, Notc.

DATE	NR.	NO.	PROCEEDINGS
02/07/92	r/s		Placed in fi not used - ORDER grntng pltf motn cmpl prod docs. pltf ORDER grntng pltf motn. cmpl disc., pltfs
		415.	Dclar Paul C. Curnin suppt exprte applic. dfts
02/10/92	r/s	416.	MO: Matsushita motn S/J GRANTED. Lois Anderson
02/11/92	r/s	417.	ORDER pltf Minton motn for lv to Amd is DENIED. dfts
02/07/92	r/s	418.	Stmnt re Ord directng prod. dfts
		419.	Rply memo P/A suppt motn limine to exclude evid 01-30-92. dfts
02/11/92	r/s	420.	ORDER Denying pltf W. Mintons motn cmpl disc. dfts
		421.	ORDER Grntng motn limine exclude evid SEC Investigatn Insider Trading .,dft
		422.	ORDER Grntng motn quash trl subp. dfts
			placed in fi not used- propsd Ord grntng Matsushita dfts motn snctns & cntmpt.
02/19/92	r/s		placed in fi not used- Ord grntng pltf motn limine re Ohashi.
02/20/92	r/s	423.	Amd ORDER the Complts in consolidated case DISM w/out lv to amd; jdgmnt may be ent DISM cnsolidatd actns w/prej; DISM all claims alleged agnst dft Matsushita excpt those alleging violatns of Rule 14d-10 promulgated under Securities Exchange Act of 1934., [Ent 02-21-92] mld cpys, Notc.

DATE	NR.	NO.	PROCEEDINGS
02/25/92	r/s	424.	Rcpt rptrs transc had 01-13-92.
02/26/92	r/s	425.	Objectns to (amd propsd) Ord & fndgs fact/cnclusns law grntng Matsushita motn S/J. class pltfs
		426.	Objectns to propsd Ord & fndgs fact/cnclusns law grntng dfts motn S/J. pltf Minton
02/27/92	r/s	427.	Dclar Carol W. Davies. dft
		428.	Ex-Prte Applic to suppl rcrd. dfts LODGED Ords to CRD.
02/28/92	r/s	429.	Dclar Barry R. Ostrager. dfts
3/2/92	r/s	430.	Opp to exprte applic Matsushita dfts to suppl rcrd. pltf
		431.	Dclar Peter S. Linden opp exprte applic Matsushita dfts suppl rcrd. pltf
3/3/92	els	432.	MO:C/R-Richard Fischer. HRG: Matsushita's ex parte applic to supplement record. Hrg hld. Crt ords mot grntd as to cause of actn.
		433.	ORD tht Matsushita's mot to supplement the record supprting the crt's 2-10-92 Ord granting S/J. in Matsushita's favor be, & hereby is grntd.
		434.	ORD tht the Matsushita's applic to supplement the record supprting the Crt's 2-10-92 Ord granting S/J. in favor of Matsushita's shall be heard on 3-4-92, 10AM. in Crtroom i of the above-entitled crt.

DATE	NR.	NO.	PROCEEDINGS
3/4/92	els	435.	Receipt for Reptr's transc had on 2-3-92 & 2-10-92.
03/16/92	r/s	436.	Errata re pleads inadvertently fi w/incorrect case number. Correct cover page. dfts LODGED dclar j/instr. to CRD.
10/01/91	sb	437.	Statmnt of genuine issue & opp to pltf Minton statmnt of Uncon fact & concl of law Dft Matsushita Acq Corp
		438.	Memo of P/A in opp to pltf Minton mot fr S/Adjudctn of issue dft Matsushita Acq Corp et al
10/21/91	sb	439.	Memo of P/A in opp to pltf mot fr lv to file 2nd Consolidated complt. dft Matsushita Acq Corp
12/2/91	sb	440.	Declar of Brian L Edwards dft Matsushita Acq Corp
12/6/91	sb	441.	Declar of Brian L Edwards ree mot fr contempt ord & for sanctns dft Matsushita Acq Corp
		442.	Declar of Brian L Edwards re mot to compel disc dft Matsushita Acq Corp
1/6/92	sb	443.	Witness List Matsushita dft
		444.	Declar of Brian L Edwards in suppt of dft resp to pltf inventory of docs produced to Matsushita dft
		445.	Resp to pltf inventory of docs produced to Matsushita dft

DATE	NR.	NO.	PROCEEDINGS
		446.	Memo of contention of fact & law dft Matsushita Acq Corp
		447.	Joint exh list
1/7/92	sb	448.	Supplemental memo of dft in opp to Epstein pltf mot to compel disc dft Matsushita Acq Corp
1/8/92	sb	449.	Declar Brian Edwards re pltf mot to compel disc dft Matsushi Acq Corp
	sb	450.	Revised statmnt pur to LR7.15.2 dft Matsushita Acq Corp
1/22/92	sb	451.	Memo of P/A in opp to Epstein pltf mot to compel disc dft Matsushita Acq Corp
		452.	Declar of Gerald L Sauer in suppt of mot fr S/J deft Matsushita Acq Corp
		453.	Notc of mot & mot fr S/J memo of P/A in suppt thereof retble 2-18-92 10am dft Matsushita Acq Corp
		454.	Separately stated obj to pltf exh dft Matsushita Acq Corp
		455.	Supplemental memo of dft in opp to pltf Minton mot to compel disc dft Matsushita Acq Corp
		456.	Declar of Brian L Edwards re dft memo of P/A in opp to Epstein pltf mot to compel disc dft Matsushita Acq Corp
1/22/92	sb	457.	Obj to Graphic evidence pur to LR 9.4.2. dft Matsushita Acq Corp

DATE	NR.	NO.	PROCEEDINGS
1/23/92	sb	458.	Delcar of Brian L Edwards in suppt of deft resp to pltf 2nd Supplemtnal inventory of docs prod to Matsushita dft
		459.	Resp to pltf 2nd Supplemtnal inventory of docs in fur suppt of dft mot fr sanctions & contempt dft Matsushita Acq Corp
1/24/92	sb	460.	Ex parte applic to Chnage hrg on Matsushita mot fr S/J to 2-10-92 11am & declar of Brian L Edwards in suppt of applic;
	sb	461.	Corrected memo of P/A in opp to Epstein pltf mot to compel disc dft Matsushita Acq Corp
1/27/92	sb	462.	Memo of P/A in opp to mot to intervene dft Matsushita Acq Corp
		463.	Ord granting ex parte applic hrg mot fr S/J 2-10-92 11am
		464.	Joint exh list submitted pur to LR 9.7 dft
1/28/92	sb	465.	Witness list dft Matsushita Acq Corp
		466.	Exh list dft
		467.	Trial brief pur to LR 9.11.2 dft Matsushita Acq Corp
		468.	Supplemental memo in opp to mot to compel disc dft Matsushita Acq Corp

DATE	NR.	NO.	PROCEEDINGS
1/29/92	sb	469.	Declar of Josph M Mclaughlin in suppt of dft mot to exclude all evidence relating to How Matsushita reached the price at which it purchased the shares of MCA Inc in tender Offer dft Matsushita Acq Corp
		470.	Declar of Brian Edwards re dft mot to compel certain disc Matsushita Acq Corp
		471.	Notc of mot to quash trial subp & notc of mot in limine to exclude certain evidence 2-3-92 10am dft Matsushita Acq Corp
		472.	Corrected exh list pur to LR 9.11.2 dft
		473.	Notc of errata re Matsushita statmnt of factual & legal issue pur to LR 9.11.2 dft
1/31/92	sb	474.	Notc of errata re delcar of Joseph M McLaughlin in suppt of mot to quash trial subp dft Matsushita Acq Corp
		475.	Memo of P/A in suppt of mot in limine to exclude all evidence relating to subject raised in pltf supplemental resp re expert Stone dft
		476.	Notc of mot in limine to exclude evidence relating to pltf 1-30-92 supplemental resp
		477.	Declar of Carol W Davies re dft to exclude all evidence relating to subject raised in pltf supplemental res re expert Stone

DATE	NR.	NO.	PROCEEDINGS
2/3/92	sb	478.	Declar of Carol W Davies filed in suppt of dft mot fr S/J dft Matsushita Acq Corp
2/4/92	sb	479.	Prop Jury instruction dft Matsushita Acq Corp
		480.	Req Voir Dire of Jury Panel dft Matsushita Acq Corp
2/5/92	sb	481.	Declar of Carol W Davies ree declar of Barry R Ostrager pur to direction of this crt deft Matsushita Acq Corp
		482.	Trial brief pur to LR 10 dft Matsushita Acq Corp
2/6/92	sb	483.	Applic & memo of P/A in suppt of ex parte applic to dism Epstein Quash Subp Strike pltf docs from Corrected exh list dft Matsushita Acq Corp
		484.	Declar of Carol W Davies re dft ex parte applic to disc Epstein quash subp & strike doc from Corrected exh list dft Matsushita Acq Corp
2/6/92	sb	485.	Prop General Verdict w/ Special Interrog dft Matsushita Acq Corp
11/25/91	sb	486.	Joint statmnt of Matsushita deft & Epstein pltf to LR 7.15.2. dft
1/27/92	r/s	487.	MO: Matsushita motn cntempt GRANTED as to all Epstein pltfs who are to produce by 02-07-92 or actn shall be dism; DENIED as to W. Mintons motn to cmpl Matsushita; GRANTED exptre S/J hrng 02-10-92; GRANTS snctns of amnt of cost of fi of motn. Lois Anderson

DATE	NR.	NO.	PROCEEDINGS
03/23/92	r/s		PIFNU- dclar Brian L. Edwards suppt motn protect Ord. dfts
11/19/91	r/s		PIFNU- Ord grntng pltf motn cmpl Geffen to appr & snctns. pltf
3/27/92	ess	488.	Receipt of Reptr's Transc had on 1-27-92.
3/31/92	bg	489.	Declar of Ernest T Kaufmann in suppt of ex parte applica to strike second amended prop ord & fndngs. pltfs
3/31/92	bg	490.	Ex parte aplica to strike second amended prop ord & fndngs. pltfs Lodged ord (Fw'd to CRD)
3/31/92	bg		Order grtng pltfs' ex parte applica to strike defts' second amended prop ord 7 fndngs (READ & PLACED IN FI NOT USED)
3/31/92	bg	491.	Declar of Peter S Linden in suppt of pltfs' ex parte applica to strike defts' second amended prop ord & fndngs of fact & conclu of law. pltfs
3/31/92	bg	492.	Objs to second amended prop ord & fndngs of fact & conclus of law grtng mot for s/j. pltfs
4/03/92	r/s	493.	Memo P/A suppt rvised Ord & fndgs fact/cnclusns law grntng dfts motn S/J dism cnsolidatd act. dfts LODGED prop Ord to CRD.
		494.	Dclar Herbert M. Wachtell suppt rvised Ord & fndgs fact/cnclusns law. dfts

DATE	NR.	NO.	PROCEEDINGS
03/27/92	r/s	495.	Objectns to 2nd propsd Ord a fndgs of fact/ cnclusns law. grntng dfts motn S/J. p
04/07/92	r/s	496.	Objectns to Rvisd Ord & Fndgs of fact/cnclusns law Grntng Matsushita dfts motn S/J. pltf
04/10/29	r/s	497.	Rcpt rptrs transc had 11-04-91.
		498.	objectns to MCA dfts Revised propsd Ord and Fndgs fact/cnclusns law grntng Matsushita dfts motn S/J. Class pltfs
		499.	Dclar Roger W. Kirby opp MCA dfts propsd Rvised Ord, etc. pltfs
04/15/92	r/s	500.	Rply memo P/A suppt rvised Ord fndgs/fact, etc. dfts
04/16/92	r/s	501.	Correctn to rply memo P/A. dfts
	PIFNU		Complt for violatn of securities laws, in intervention. pltf
	PIFNU		stmnt uncntrovrtd facts/cnclusns law. dft Matsushita
	PIFNU		Ord strikng ports of S/J motn tkng dfts motn off cal & for snctns. pltf
	PIFNU		Ord grntng pltfs exprte applic providng for srvc of trl subp. pltf
	PIFNU		Ord grnt Krieger & Price Water-house exprte applic to quash subp.

DATE	NR.	NO.	PROCEEDINGS
			PIFNU final jdgmnt grntng Matsushita dfts motn S/J. dfts
			PIFNU Ord a fndgs of fact/cnclusns law grntng Matsushita dfts motn S/J.
			PIFUU Ord & fndgs fact/cnclusns law grntng Matsushita dfts motn S/J. (Amd)
			PIFNU final jdgmnt grntng Matsushita dfts motn S/J. dfts
		502.	Second Amd Ord & Fndgs of Fact & Cnclusns of law Grntng Matsushita dfts motn for S/J Dism the cnsolidatd actns; Matsushita awarded costs and atty fees and snctns., [Ent 04-17-92] mld cpys, Notc., MD JS-6.
4/8/92	ess	503.	Suppl declr of Herbert M. Wachtell in suppt of revised (prop ord & findngs of facts & concluc of law defts' mot for S/J. dfts
4/17/92	ess	504.	2nd suppl declr of Herbert Wachtell in suppt of revised (prop Ord, etc. dfts)
4/16/92	ess		LFNU re Ord grnting mot in limine to exclude evidence relating to plfs' 1-30-92 supple resp. dfts
			LFNU re Final jdmt granting Matsushita's mot for S/J.dfts
			LFNU re Ord granting mot in limine to exclude all evidence relating to How Matsushita reached Price at which it purchased. dfts

DATE	NR.	NO.	PROCEEDINGS
			PLFNU re Ord granting'd defts' ex parte appl to schedule hrg on Matsushita mot to quash. dfts
			PLFNU re Ord granting mot to quash trial subpoenas & to strike all irrelevant docs frm plfs corrected exhbt list.
5/8/92	pb	505.	PLF, (Walter Minton), FLD NTC OF APP TO THE 9th C/A FRM 2ND AMD ORD FLD ON 4-16-92; AMD ORD FLD ON 2-20-92; ORD FLD 2-11-92. PTY SVC: Peter R. Dion Kindem; Greenberg, Glusker, Fields, Claman & Machtinger; Kaufman, Malchaman, Kaufman & Kirby of Los Angeles & New York; Simpson, Thacher & Bartlett; Wachtell, Lipton on 5-26-92. FEES BILLED. (CV-91-0336-R)
5/12/92	pb	506.	ATTYS FOR PLF, (Roger W. Kirby and Kaufman Malchaman Kaufman & Kirby, FLD NTC OF APP TO THE 9th C/A FROM ORD FLD 1-27-92. PTY SVD: Ernest T. Kaufmann; Rosenfield Meyer & Susman; Greenberg, Glusker, Fields, Claman & Machtinger; Wachtell, Lipton, Rosen & Katz; Simpson, Thacher & Bartlett; Berman, Blanchard, Mausner & Kindem on 5-28-92. FEES BILLED. (CV-90-6744-R; CV-90-6774-R; CV-90-6775-R)
5/12/92	pb	507.	PLF (Epstein), Linder, Rockford etc. FLD NTC OF APP TO THE 9th C/A FROM 2ND AMD ORD FLD 4-16-91; ord fld 8-13-91; AMD

DATE	NR.	NO.	PROCEEDINGS
			ORD FLD 2-20-92; MO: FLD 4-1-91; MO FLD 9-6-91; MO:FLD 12-16-91; MO FLD 1-27-92; MO: FLD 4-1-91: PTY SVD: Ernest Kaufman; Rosenfeld Meyer & Susman; Greenberg, Glusker, Fields, Claman & Machtinger; Wachtell, Lipton, Rosen & Katz; Simpson, Thacher & Bartlett; Berman, Blanchard, Mausner & Kindem on 5-28-92. FEES BILLED. (CV-90-6744-R; CV-90-6774-R; CV-90-6775-R)
5/15/92	pb	508.	PLF (Epstein), Linder, Rockford etc. FLD AMENDED NTC OF APPL TO THE 9th C/A FROM 2ND AMD ORD FLD 4-16-91; FLD MO 12-9-92; ORD FLD 8-13-91; AMD ORD FLD 2-20-92; MO: FLD 4-1-92; MO FLD 9-6-91; MO: FLD 12-16-91; MO FLD 1-27-92; MO: FLD 4-1-91: PTY SVD: Ernest Kaufmann; Rosenfeld Meyers & Susman; Breegnberg, Glusker, Fields, Claman & Machtinger; Wachtell, Lipton, Rosen & Katz; Simpson, Thacher & Bartlett; Berman, Blanchard, Mausner & Kindem on 5-28-92. FEES WAIVED. (CV-90-6774-R; CV-90-6774-R; CV-90-6775-R)
		509.	Rcpt rptrs fransc had 07-01-91 (30 pgs).
05/14/92	r/s	510.	Transc desig & Ord form.
05/28/92	r/s	511.	Rcpt for rptrs transc had 07/01-91.

DATE	NR.	NO.	PROCEEDINGS
06/08/92	r/s	512.	Transc desig & Ord form.
		513.	Transc desig & Ord form.
06/10/92	r/s	514.	Amd rcpt for rptrs transc had 12-16-91.
06/22/92	r/s	515.	Rcpt rptrs transc had 09-03-91.
06/23/92	r/s	516.	Rcpt rptrs transc 04-01-91.
06/30/92	r/s	517.	Rcpt rptrs transc had 12-28-90 & 12-09-91.
07/16/92	r/s	518.	ORDER that the *Epstein* plfs & plf Walter Minton tke nothing, that the actns are DISM on merits, and that dfts Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corp., Matsushita Acquisition Corp., MCA Inc., Lew R. Wasserman and Sidney J. Sheinberg rcovr frm the *Epstein* plfs and plf Walter Minton the costs of this actn., [Ent 07-21-92] mld cpys, Notc.
05/13/92	r/s	519.	Rcpt for rptrs transc had 12-16-91.
07/21/92	r/s	520.	Notc of Mot & mot to vacate purported amd jgm fi on/or about 07-17-92, rtbl 08-17-92, @ 10:00 AM, Crtrm 8. plfs LODGED Ord to CRD.
07/27/92	r/s	521.	Notc applic & applic for snctns upon finding of cntempt. dft
		522.	Dclar Paul C. Curnin suppt applic for snctns upon finding cntempt. dft

DATE	NR.	NO.	PROCEEDINGS
		523.	Dclar Carol W. Davies suppt opp to mot Vacate jgm. dfts.
		524.	Opp to mot vacate. dfts
07/31/92	r/s	525.	Notc errata re notc to clk of applic to tax costs. dfts
08/03/92	r/s	526.	dclar Ernest T. Kaufmann opp applic for snctns. plf
07/29/92	r/s	527.	Notc to clk of applic to tax costs. dfts
		528.	dclar Carol W. Davies re dclar suppt applic for costs. dfts
		529.	dclar Paul C. Curnin suppt applic for costs. dfts
		530.	BILL OF COSTS, rtbl 08-17-92, @ 10:00 AM. dfts TAXED COSTS $7,686.
08/04/92	r/s	531.	Notc chng dte for hrng applic to tax costs, rtbl 08/17/92, @ 10:00 AM. dfts
08/07/92	r/s	532.	objectns to Matsushita dfts applic to tax costs. plf
		533.	dclar Peter R. Dion Kimdem suppt plf objectns to Matsushita applic costs. plf
		534.	dclar Peter S. Linden opp Matsushita applic tax costs. plfs

DATE	NR.	NO.	PROCEEDINGS
08/03/92	r/s	535.	memo P/A opp applic for snctns upon finding of cntempt. plf FILED UNDER SEAL.
8/3/92	pb	536.	PLFS, (EPSTEIN, LINDER ETC.) FLD SUPPLEMENTAL AND PROTECTIVE AMENDED NTC OF APP TO THE 9th C/A FROM JGM FLD 4-16-92 & ENTRD 4-17-92; ORD FLD 8-13-91; AND ORD ENTRD 2-21-91; ORD ENTRD 4-1-91 & 9-6-91; ORD FLD 12-16-91; ORD FLD 1-27-92; JDMT ENTRD 7-21-92. PTY SVC: Ernest T. Kaufmann; Robert B. Rotstein; Robert S. Chapman; Theodore N. Mirvis; Dennis Jacobs; Peter Kindem on 8-20-92. FEES WAIVED.
8/3/92	pb	537.	PLF, (KIRBY; KAUFMAN ETC.) FLD SUPPLEMENTAL AND PROTECTIVE AMENDED NTC OF APP TO THE 9th C/A FROM ORD FLD 1-27-92; JGM FLD 4-16-92, ENTRD 4-17-92; JGM ENTRD 7-21-92. PTY SVC: Ernest T. Kaufmann; Robert H. Rotstein; Robert S. Chapman; Theodore N. Mirvis; Dennis Jacobs; Peter Kindem on 8-20-92. FEES WAIVED.
8/21/92	gk	---	LODGED MATSUSHITA DFTS' PROP ORD DENYING MOT TO VACATE JGM (Fwd to CRD).

DATE	NR.	NO.	PROCEEDINGS
8/21/92	gk	---	LODGED MATSUSHITA DFTS' PROP ORD AWARDING SANCTIONS (Fwd to CRD).
08/14/92	r/s	538.	rply dclar Carol W. Davies Suppt applic for costs by prevailing pty. dfts
08/07/92	r/s	539.	objectns to bill of costs. plf
		540.	dclar Douglas Cardwell opp applic costs. plfs
08/18/92	r/s	541.	MO: plfs mot to vacate amd jgm dendfnse applic for snctns gr $1,500.; plfs mot stay pend appeal den. Sharon Seffen
08/24/92	r/s	542.	mot to retax costs awarded by clk, rtbl 09-21-92, @ 10:00 AM. plf
08/25/92	r/s	543.	ORD den mot vacate jgm. dfts
		544.	ORD dft applic gr; the Epstein plfs and their cnsl must pay $15,000. to the ord of Matsushita Electric Industrial Co., Ltd. as snctns., [Ent 08-31-92] mld cpy dft.
09/01/92	r/s		Deposited $15,000 into the register of the crt. plf
8/27/92	bg	545.	obj to form of ord prop by Matsushita defts awarding sanctions. pltfs
9/2/92	bg	546.	Opp to mot to retax costs. defts
9/3/92	bg	547.	Memo of p&a in opp to mot to retax costs awarded by clk; declar of Peter S Linden in opp to mot to retax costs. pltfs

DATE	NR.	NO.	PROCEEDINGS
08/10/92	bg	548.	rply memo P/A suppt mot vacate jgm. plfs
		549.	rply memo in connectn w/applic for snctns upon finding cntempt. dfts
	r/s	550.	MO: on crts own mot the 10:00 AM mot heretofore shced 08-17-92 cont to 08-18-92, @ 09:00 A.M, n/r
08/12/92	r/s	551.	ORD allow apprnce non-res atty Peter S. Linden by desig Ernest T. Kaugmann., plf
08/13/92	r/s	552.	dclar Peter S. Linden rspnse to objectns to applic for costs. plfs
		553.	suppl dclar Jeffrey H. Squire opp applic for costs. plfs
09/14/92	r/s	554.	MO: Mintons mot to retax costs awarded by clerk cont to 10-05-92, @ 10:00 AM; replies due 09-14-92. n/r
9/23/92	dlm	555.	PLF (LARENCE EPSTEIN) FLD SECOND SUPPLEMENTAL AND PROTECTIVE AMENDED NOTIC OF APPEAL TO THE 9TH C/A FRM ORD FLD ON 8/25/92. FEES WAIVED. PTY SVC: ERNEST T. KAUFFMANN: ROBERT H. ROTSTEIN: ROBERT S. CHAPMAN: THEODORE N. MIRVIS: DENNIS JACOBS: PETER KINDEM ON 10/15/92.

DATE	NR.	NO.	PROCEEDINGS
9/23/92	dlm	556.	PLF (ROGER W. KIRBY) FLD SECOND SUPPLEMENTAL AND PROTECTIVE AMMENDNOTICE OF APPEAL TO THE 9TH C/A FRM ORD FLD ON 8/25/92 FEES WAIVED. PTY SVC: ERNEST T. KAUFFMANN: ROBERT H. ROTSTEIN: ROBERT S. CHAPMAN: THEODORE N. MIRVIS: DENNIS JACOBS: PETER KINDEM ON 10/15/92.
10/5/92	rm	557.	MO: Minton's mot to retax costs awd by clrk is DENIED. Plft to prepare prop ord. CR. L. Anderson
10/14/92	rm	558.	Recpt ofr reprtr's trnscrpts of hrg on 8/18/92.
1/13/93	dm		FWD to 9th CCA (9) VOLS. ORIG REPTR'S TRANSCR. (ROUTE TO APPEAL SECTN).
2/22/93	yrt		Rcvd frm 9th CCA 1 vol orig clks file.
12/20/93	jcw		LODGED cc of Order frm 9th CCA, that this case is ord resubmitted as of 10/12/93.
7/11/94	yrt		FWD to 9th CCA 36 vols orig file.
			FWD to 9th CCA 5 vols rptr trascp.
3/24/95	yrt		LODGED cc ord frm 9th CCA vcating order of dist court.
3/28/95	yrt	559.	Ntc of hrg on filing & spreading judgment of CCA; hrg on 4/17/95, 11:00.

DATE	NR.	NO.	PROCEEDINGS
04/06/95		563.	RECORD on appeal returned from U.S. Court of Appeals vols: 10 (fvap) [Entry date 05/15/95]
04/14/95		562.	NOTICE of association of cnsl by plaintiff Lawrence Epstein (yt) [Entry date 04/28/95]
04/17/95		560.	MANDATE from Circuit Court of Appeals vacating & remanding is hereby fld and spread upon the minutes of this USDC. The record reflects that costs of the prevailing party were taxed by the 9th CCA in the amount of $805.59 on 3/20/95. PTC set 9/15/95, 11:00 and trial set 10/10/95, 9:00 (yt) [Entry date 04/21/95]
04/17/95		561.	CERTIFIED COPY of Appellate Court Order: vacating and remanding (ENT 4/21/95) MD JS-5 (yt) [Entry date 04/21/95] [Edit date 04/21/95]
06/5/95		564.	MEMO IN OPP by plaintiff to motion for class certification (yt) [Entry date 06/06/95]
06/5/95		565.	DECLARATION of Peter S. Linden by plaintiff re motion for certification of class (yt) [Entry date 06/06/95]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Proceedings include all events.

No. 92-55675

LAWRENCE EPSTEIN; JOHN LINDER; JANE ROCKFORD, AS TRUSTEE OF THE MICHAEL J. ROCKFORD TRUST; MAURICE KARLIN; RUTH KARLIN; BETH ANN KARLIN; BERT P. KARLIN

Plaintiffs - Appellants

and

WALTER MINTON

Plaintiff

v.

MCA, INC., MATSUSHITA ACQUISITION CORPORATION; MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; MATSUSHITA HOLDING CORPORATION; LEW WASSERMAN; SIDNEY J. SHEINBERG

Defendants - Appellees

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
6/9/92	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. setting schedule as follows: Fee payment is due 6/23/92 ; CADS due 6/23/92 for Ernest T. Kaufman; appellant's designation of RT is due 5/22/92,,,,,, ; appellee's designation of RT is due 6/1/92,,,,,, ; appellant shall order transcript by 6/11/92,,,,,, ; court reporter shall file transcript in DC by 7/13/92; certificate of record shall be filed by 7/20/92 ; appellant's opening brief is due 8/28/92,,,,,, ; appellees' brief is due 9/28/92,,,,,, ; appellants' reply brief is due 10/13/92,,,,,, ; [92-55675] (rmw) [92-55675]
6/9/92	2	Received copy of amended notice of appeal from district court. Docket fee of $105.00 has been PAID. Date of payment: May 15, 1992. (rmw) [92-55675]
6/23/92	4	Filed attorney for Appellant in 92-55675 Civil Appeals Docketing Statement served on 6/22/92 (to CONFATT) [92-55675] [92-55675] (dr) [92-55675]
8/14/92	5	Filed order (Joseph T. SNEED,): Aples opposed motion to consolidate Nos 92-55288, 92-55632, 92-55675 and 92-55677 is granted in part. Nos. 92-55632, 92-55675 and 92-55677 shall be consolidated. However, all of the above appeals shall be calendared before same merits panel. Epstein aplts motion to file a 100 page opening brief is granted in part. Epstein aplts brief shall not exceed 65 pages. Aplt Walter Minton's motion to file 100-page opening brief is granted in part. The brief shall not exceed 65 pages.Epstein aplts and aples motions for ext of time to file the briefs are granted. Briefing shall proceed as follows for nos. 82-55632, 92-55675 and 92-55677: all remaining opening brief are due Sept 24, 1992, aples' ans brief(s) are due Oct 26, 1992, optional reply briefs due 14 days from service ans briefs. Briefing in appeal No. 92-55288 shall proceed as follows:

DATE	NO.	PROCEEDINGS
		aples ans brief due Sept 14, 1992, optional reply brief due 14 days from service ans brief. [92-55632, 92-55675, 92-55677] (ec) [92-55632 92-55675 92-55677]
8/20/92	6	Received copy of Supplemental & Protective Amended notice of appeal from district court filed: 8/3/92 under case #92-55675. (case file) (lu) [92-55675]
9/3/92	7	Filed CERTIFICATE OF RECORD ON APPEAL RT filed in DC 5/15/92 [92-55632, 92-55675, 92-55677] (lu) [92-55632 92-55675 92-55677]
9/3/92	8	Filed CERTIFICATE OF RECORD ON APPEAL RT filed in DC 6/30/92 [92-55675, 92-55632, 92-55677] (lu) [92-55632 92-55675 92-55677]
9/3/92	9	Filed CERTIFICATE OF RECORD ON APPEAL RT filed in DC 6/30/92. [92-55677, 92-55632, 92-55675] (lu) [92-55632 92-55675 92-55677]
9/25/92	10	Filed original and 15 copies Appellant Walter Minton in 92-55632 opening brief (no) 63 pages and five excerpts of record in 4 volumes; served on 9/24/92 [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]
9/25/92	11	Filed original and 15 copies Appellant Roger W. Kirby in 92-55677 opening brief (Informal: no) 33 pages and five excerpts of record in 1 volume; served on 9/24/92 [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]

DATE	NO.	PROCEEDINGS
9/28/92	12	Filed original and 15 copies Appellant Walter Minton in 92-55632 opening brief (Informal: no) 65 pages and five excerpts of record in 2 volumes; served on 9/24/92 [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]
9/28/92	13	Filed Appellant Walter Minton in 92-55632's motion to take judicial notice (CIVATT) [92-55632, 92-55675, 92-55677] served on 9/24/92 [2217297] [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]
9/30/92	16	Case released from Pre-Briefing Conference program. (mlm) [92-55632 92-55675 92-55677 92-55709 92-55914 92-55923 92-55958 92-56004 92-56008 92-56012 92-56026 92-56031]
10/6/92	14	Filed order (Cecil F. POOLE,): The ct is in receipt of the aples mtn to file a 130 page aples aplts opposition and aples reply to aplt opposition. Aples mtn to file an oversize brief is granted in part. The aples briefs shall not exceed 65 pages. The briefing schd established 8/14/92 remains in effect. [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]
10/8/92	15	Received copy of supplemental & protective amended notice of appeal from district court Filed: 8/3/92. (case file) (lu) [92-55632 92-55675 92-55677]
10/13/92	17	Case released from Pre-Briefing Conference program. (mlm) [92-55632 92-55675 92-55677 92-55966 92-55976 92-55977 92-56029 92-56052 92-56084 92-56104 92-56129 92-56150 92-56167 92-56170]

DATE	NO.	PROCEEDINGS
10/19/92	18	Received copy of 2nd Supplemental & Protective AMENDED NOA from district court Filed: 9/23/92. (case file) (lu) [92-55675]
10/21/92	19	Filed order (Deputy Clerk: lp) The ct is in receipt of plaintiff's mtn to supplement the CADS. The mtn is unnecessary this appeal was released from CONFAT 10/13/92. The ct is also in receipt of aplts mtn to supplement the record the record with documented history of events that have taken place in the DC after the NOAs were filed. The mtn is denied. [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]
10/26/92	20	Filed aples' motion to extend time to file appellee's brief (PROMO) [92-55632, 92-55675, 92-55677] served on 10/19/92 [2253854] (tsp) [92-55632 92-55675 92-55677]
10/26/92	21	Filed Appellants' statement of non-opposition of aplt Minton to mot of aples for ext of time to file answering brief. (PROMO) [92-55632, 92-55675, 92-55677] (tsp) [92-55632 92-55675 92-55677]
11/27/92	25	Filed original and 15 copies appellee Lew Wasserman in 92-55632, Sidney J. Sheinberg in 92-55632's 63 pages brief, 5 suppl Exc. vols: ; served on 11/25/92 [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]

DATE	NO.	PROCEEDINGS
11/27/92	27	Received orig. 15 copies Matsushita Acquis in 92-55675, Matsushita Electric in 92-55675's brief of 62 pages 5 suppl exc; served on 11/25/92 deficient: Csl has submitted 2 aples briefs. Csl notified that a mtn is needed for filing. [92-55675, 92-55632] (wp) [92-55675]
11/27/92	46	Received orig. 15 copies Matsushita Electric in 92-55675's brief of 45 pages 5 exc; served on 11/25/92 deficient: party submitted 2 briefs, a mtn is needed. [92-55675, 92-55632, 92-55677] Csl notified (wp) [92-55632 92-55675 92-55677]
11/30/92	22	Filed order (Deputy Clerk: lp) granting appellee's motion to extend time to file appellee's brief [2253854-1] appellees' brief due 11/25/92. The ct is also in receipt of plt's motion's response to the mot and the defts' ltr of 11/4/92. The optional reply brief is due 14 days from service of the answering brief. in 92-55632, 92-55675, 92-55677 [92-55632, 92-55675, 92-55677] (tsp) [92-55632 92-55675 92-55677]
12/1/92	23	10 day oral extension by phone of time to file Walter Minton in 92-55632's reply brief. [92-55632, 92-55675, 92-55677] appellants' reply brief due 12/21/92 in 92-55632; (cb) [92-55632 92-55675 92-55677]
12/1/92	24	10 day oral extension by phone of time to file Lawrence Epstein in 92-55675, John Linder in 92-55675, Jane Rockford in 92-55675, Maurice Karlin in 92-55675, Ruth Karlin in 92-55675, Beth Ann Karlin in 92-55675, Bert P. Karlin in 92-55675,

DATE	NO.	PROCEEDINGS
		Roger W. Kirby in 92-55677, Kaufman, Malchman in 92-55677's reply brief. [92-55632, 92-55675, 92-55677] appellants, reply brief due 12/21/92 in 92-55632, in 92-55675, in 92-55675, in 92-55675, in 92-55675, in 92-55675, in 92-55675, in 92-55677, in 92-55677; (cb) [92-55632 92-55675 92-55677]
12/10/92	28	Received from Joseph M. McLaughlin, letter dated Dec 8, 1992 with corrected affidavits of service for aples' briefs served by Matsushita in these appeals. [92-55632, 92-55675, 92-55677] (ec) [92-55632 92-55675 92-55677]
12/17/92	30	Filed order (Deputy Clerk: lp) Plaintiff's mtn for oral argument and any response thereto shall be referred to the panel that will consider the merits of the appeal. The plaintiff's mtn to expedite oral argument is denied. This appeal shall be calendared in due course. The plaintiff's mtn for leave to file a 40 page reply brief is denied. The reply brief shall be filed by 12/24/92 and shall consist of no more than 25 pages. [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]
12/17/92	31	Filed appellees' memorandum in response to aplts' motion to set case for oral argument... served on 12/16/92 ********* [92-55675] (ec) [92-55675]
12/24/92	33	Filed original and 15 copies Walter Minton in 92-55632 reply brief, (Informal: no) 25 pages; served on 12/21/92 [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]

DATE	NO.	PROCEEDINGS
12/28/92	32	Filed original and 15 copies Lawrence Epstein in 92-55675 reply brief, (Informal: no) 25 pages; served on 12/24/92 [92-55675, 92-55632, 92-55677] (ft) [92-55632 92-55675 92-55677]
1/4/93	34	Filed motion and deputy-clerk order :(Deputy Clerk: lp) The request for judicial notice and any responsive filings shall be referred to the merits panel. [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]
1/19/93	36	FILED AS OF 9/3/92, CERTIFIED RECORD ON APPEAL IN 41 VOLS. (TOTAL): 36 Clk's Rec 5 RTS (ORIG) [92-55675, 92-55632, 92-55677] [92-55675, 92-55632, 92-55677] (rc) [92-55632 92-55675 92-55677]
2/16/93	37	Filed Lew Wasserman in 92-55675, Sidney J. Sheinberg in 92-55675 additional citations, served on 2/12/93.(records for PANEL) [92-55675, 92-55632] (jlc) [92-55632 92-55675]
2/25/93	38	Received Barry Ostrager for Appellee Matsushita Acquis, Appellee Sidney J. Sheinberg, Appellee Lew Wasserman, Appellee Matsushita Holding, Appellee Matsushita Electric in 92-55632 letter dated 2/24/93 re: I write to advise the ct of a recent decision in a related state ct proceeding... (CASEFILE) [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675, 92-55677]

DATE	NO.	PROCEEDINGS
3/4/93	40	Filed Appellants ltr dtd 3/3/93 in response opposing atty's ltr dtd 2/24/93 (CIVATT) served on 3/3/93 192-55675] (mhf) [92-55675]
4/5/93	39	Calendar check performed [92-55632, 92-55675, 92-55677] (th) [92-55632 92-55675 92-55677]
4/22/93	41	Filed order (Deputy Clerk: MEH) MCA's 2/24/93 ltr, re possible mootness of some claims based on a 2/12/93 Delaware Chancery Court decision, and aplts' 3/3/93 response thereto are REFERRED TO THE PANEL on the merits for such consideration as the panel deems approp. Copies of the ltrs and attachments thereto have been sent to the records unit with this order. [92-55288, 92-55632, 92-55675, 92-55677] (sw) [92-55288 92-55632 92-55675 92-55677]
5/17/93	44	Received Matsushita Electric in 92-55632 additional citations, served on 5/14/93 [92-55632, 92-55288, 92-55675, 92-55677] (PANEL faxed 7/8/93) (wp) [92-55288 92-55632 92-55675 92-55677]
5/24/93	42	Calendar check performed [92-55288, 92-55632, 92-55675, 92-55677] (aw) [92-55288 92-55632 92-55675 92-55677]
5/28/93	43	Calendar materials being prepared. [92-55632, 92-55675, 92-55677] [92-55632, 92-55675, 92-55677] (mw) [92-55632 92-55675 92-55677]
6/4/93	45	CALENDARED: PASADENA Aug 2 1993 1:30 pm Courtroom 2 [92-55632, 92-55675, 92-55677] (aw) [92-55632 92-55675 92-55677]

DATE	NO.	PROCEEDINGS
7/20/93	47	Filed Appellant Lawrence Epstein's motion to consolidate oral argument of related cases, or in the alternative changing order of argument. (PANEL) [92-55632, 92-55288, 92-55675, 92-55677] served on 7/19/93 [2395377] [92-55632, 92-55288, 92-55675, 92-55677] (wp) [92-55288 92-55632 92-55675 92-55677]
7/26/93	48	Filed order (Deputy Clerk: gb) Aplt's mtn of 7/20/93 is granted in part. Argument in the above caption ed cases shall be consolidated. Each side shall have 40 minutes to present arguments. (PASADENA) [92-55632, 92-55288, 92-55675, 92-55677] (wp) [92-55288 92-55632 92-55675 92-55677]
8/2/93	49	ARGUED AND SUBMITTED TO William A. NORRIS, Charles E. WIGGINS, Diarmuid F. O'SCANNLAIN [92-55288, 92-55632, 92-55675, 92-55677] (lu) [92-55288 92-55632 92-55675 92-55677]
8/10/93	50	Filed order (William A. NORRIS, Charles E. WIGGINS, Diarmuid F. O'SCANNLAIN,): The parties shall file simultaneous suppl briefs addressing the preclusive effect if any of the Delaware Chancery Ct's approval of the class settlement releasing all federal claims arising from Matsushita's tender offer for MCA shares. The suppl briefs shall be filed with the ct no later than 21 days after the filing of this order. Submission is Vacated. The cases will be resubmitted upon the filing of the suppl briefs. [92-55632, 92-55288, 92-55675] (wp) [92-55288 92-55632 92-55675]

DATE	NO.	PROCEEDINGS
8/24/93	53	Rec'd notice of change of firm's name Kaufman, Malchman, Kaufmann & Kirby has become KAUFMAN, MALCHMAN, KIRBY & SQUIRE (same address). Ernest T. Kaufmann is no longer a member of the firm. (Casefiles) [92-55675, 92-55677] (gva) [92-55675 92-55677]
9/1/93	55	Filed Matsushita Electric motion requesting oral argument (PANEL) [92-55632, 92-55675, 92-55677] served on 8/31/93 [2420393] (wp) [92-55632 92-55675 92-55677]
9/1/93	56	Filed original and 15 copies Appellee Matsushita Electric supplemental brief of 32 pages and 5 suppl excerpts, served on 8/31/93 (PANEL) [92-55632, 92-55288, 92-55675, 92-55677] (wp) [92-55288 92-55632 92-55675 92-55677]
9/1/93	57	Filed original and 15 copies Lawrence Epstein supplemental brief of 38 pages, 5 excerpt entitled declaration transmitting delarware documents relevant to court's order for further briefing. served on 8/31/93 (PANEL) [92-55632, 92-55288, 92-55675, 92-55677] (wp) [92-55288 92-55632 92-55675 92-55677]
9/2/93	58	Recvd Notice from atty Ernest T. Kaufmann change in firm name only. (CASEFILE) served on 8/31/93 [92-55675, 92-55677] (wp) [92-55675 92-55677],

DATE	NO.	PROCEEDINGS
9/20/93	59	Received original and 15 copies Appellee MCA, Inc. in 92-55632, Appellee Sidney J. Sheinberg in 92-55632 supplemental brief of 13 pages, served on 9/17/93 deficient: ct did order this brief : Notified counsel. (PANEL) [92-55632, 92-55288, 92-55675] (wp) [92-55288 92-55632 92-55675]
9/22/93	60	Filed Plaintiffs-Appellants' motion to strike whole of "Reply Brief of Appellees on Preclusive Effect of Delaware Settlement" (PANEL); [92-55675, 92-55632, 92-55677] served on 9/21/93 [2431624] [92-55675, 92-55632, 92-55677] (sa) [92-55632 92-55675 92-55677]
9/23/93	61	Filed order (William A. NORRIS, Charles E. WIGGINS, Diarmuid F. O'SCANNLAIN,): The ct will hear oral argument concerning the preclusive effect if any of the Delaware Chancery Ct's approval f the class settlement releasing all federal claims arising from Matshita's tender offer for MCA shares. Argument will be heard on 10/12/93, at 1:00 p.m. in courtroom 2 of the USCA in San Francisco. Each side will be allotted 30 minutes of argument. (csl Phoned) [92-55632, 92-55288, 92-55675] (wp) [92-55288 92-55632 92-55675]
9/23/93	62	Received Matsushita Electric in 92-55632, Matsushita Holding additional citations, served on 9/22/93 (PANEL) [92-55632, 92-55288, 92-55675] (wp) [92-55288 92-55632 92-55675]

DATE	NO.	PROCEEDINGS
9/29/93	63	Filed order (William A. NORRIS, Charles E. WIGGINS, Diarmuid F. O'SCANNLAIN): The Epstein plaintiff-aplt's mtn to strike the "Reply brief of deft-aples on Preclusive Effect of Delaware Settlement" is DENIED. The Epstein aplt's mtn to file a reply brief is GRANTED. They may file a reply brief of not more than 15 pgs. by no later than Wednesday, 10/6/93. (phoned out) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
10/5/93	64	Filed original and 15 copies Epstein's reply brief, (Informal: no) 11 pages; served on 10/4/93 (PANEL) [92-55632, 92-55288, 92-55675, 92-55677] (wp) [92-55288 92-55632 92-55675 92-55677]
10/12/93	65	ARGUED AND SUBMITTED TO William A. NORRIS, Charles E. WIGGINS & Diarmuid F. O'SCANNLAIN; CJJ. [92-55288, 92-55632, 92-55675] (jr) [92-55288 92-55632 92-55675]
12/22/93	67	Received Herbert M. Wachtell for Appellees' letter dated 12/21/93 re: supplemental authority (12/21). (PANEL) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
1/3/94	68	Filed Mary Kay Vyskocil's additional citations, served on 12/30/93. (PANEL) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
1/3/94	69	Filed Peter S. Linden's additional citations, served on 12/30/93. (Panel) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]

DATE	NO.	PROCEEDINGS
3/2/94	70	Filed ltr dtd 3/1/94 from Henry P. Monaghan re additional citations; Attachment; served on 3/1/94. (PANEL) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
3/8/94	71	Received Mary Kay Vyskocil letter dated 3/7/94 in response to aples ltr of 3/1/94 re addt'l cites (3/7). (PANEL) [92-55288, 92-55675] (sw) [92-55288 92-55675]
3/15/94	72	Filed Matsushita Electric in 92-55632 additional citations, served on 3/14/94 (PANEL) [92-55632, 92-55288, 92-55675, 92-55677] (wp) [927-55288 92-55632 92-55675 92-55677]
3/18/94	73	Received Henry P. Mongahan's letter dated 3/17/94 re: additional cites (3/17). (PANEL) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
4/12/94	74	Received Henry P. Mongahan's letter dated 4/11/94 re: pet. for cert. in 92-1988 has been dismissed (4/11). (Fax to Panel) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
4/19/94	75	Received letter dated 4/18/94, from Herbert M. Wachtell, Esq., csl for defts-aples respectfully advise the ct of the 4/12/94 Judgment Order of the USCA for the Third Cir. in Sandler Assocs., L.P. v. BellSouth Corp., No. 93-7343. (PANEL), served on 4/19/94 [92-55675, 92-55288, 92-55632] (rc) [92-55288 92-55632 92-55675]

DATE	NO.	PROCEEDINGS
4/21/94	76	Received Lawrence Epstein in 92-55675 additional citations, served on 4/20/94 (PANEL) [92-55675, 92-55288, 92-55632, 92-55677] (wp) [92-55288 92-55632 92-55675 92-55677]
4/25/94	78	Received Sidney J. Sheinberg additional citations, served on 4/22/94 (PANEL) [92-55632, 92-55288, 92-55675, 92-55677] (wp) [92-55288 92-55632 92-55675 92-55677]
4/26/94	77	Received letter dated 4/25/94, from Henry P. Monaghan, Esq. re: This ltr is filed pursuant to FRAP 28(j) concerning the Supreme Ct's recent decision in Central Bank of Denver N.A. v. First Interstate Bank of Denver, N.A., No 92-854 ... (PANEL), served on 4/25/94 [92-55675, 92-55288, 92-55632] (rc) [92-55288 92-55632 92-55675]
4/29/94	79	Received Berman, Blanchard Mausner & Kindem additional citations, served on 4/28/94 (PANEL) [92-55677, 92-55288, 92-55632, 92-55675] (wp) [92-55288 92-55632 92-55675 92-55677]
5/3/94	80	Received Herbert M. Wachtell for Appellees' letter dated 5/2/94 re: additional cites (5/2). (PANEL) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
7/8/94	85	Received Lew Wasserman in 92-55632 additional citations, served on 7/7/94 (PANEL) [92-55632, 92-55675, 92-55677] (wp) [92-55632 92-55675 92-55677]

DATE	NO.	PROCEEDINGS
11/10/94	86	Received Henry P. Mongahan's letter dated 11/9/94 re: additional cites (11/9). (PANEL) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
11/14/94	87	Received Barry Ostrager letter dated 11/10/94 re: additional citations (11/10). (PANEL) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
11/15/94	88	Received Henry P. Mongahan's letter dated 11/14/94 re: Mr. Ostrager's submission of 11/10 (11/14). (PANEL) [92-55288, 92-55632, 92-55675] (sw) [92-55288 92-55632 92-55675]
2/9/95	90	Received Sidney J. Sheinberg in 92-55632 additional citations, served on 2/8/95 (PANEL) [92-55632, 92-55288, 92-55675] (wp) [92-55288 92-55632 92-55675]
2/27/95	91	FILED OPINION: We Vacte the DC's order denying the mtn for leave to amend and remand to the DC for reconsideration of the mtn. The DC's order denying plaintiff's mtn for partial summary judgement against Matsushita on the Wasserman claim is Reversed, and the DC is instructed to grant such mtn. The DC's order granting Matsushita's mtn for summary judgement is VACATED. The DC's order dismissing plaintiff's claims against MCA Wasserman and Sheinberg for aiding and abeting is AFFIRMED. The DC's orders denying the Epstein mtn for class certification and for leave to amend their complaint are VACATED and REMANDED. (Terminated on the Merits after Oral Hearing;

DATE	NO.	PROCEEDINGS
		Reversed; Written, Signed, Published. William A. NORRIS, author; Charles E. WIGGINS; Diarmuid F. O'SCANNLAIN) FILED AND ENTERED JUDGMENT. [92-55632, 92-55675] (wp) [92-55632 92-55675]
3/13/95	92	[2750658] Filed original and 40 copies Appellee Matsushita Electric petition for rehearing with suggestion for rehearing en banc (PANEL ALL ACTIVE JUDGES) 15 p.pages, served on 3/12/95 [92-55632, 92-55675] (wp) [92-55632 92-55675]
3/13/95	93	Filed Appellant Lawrence Epstein in 92-55675 bill of costs, served on 3/10/95 [92-55675] (wp) [92-55675]
3/17/95	94	Received Appellee Lew Wasserman in 92-55632 letter dated 3/16/95 re: respectfully submit this ltr in connection with the petition for rehearing. (PANEL) [92-55632, 92-55675] (wp) [92-55632 92-55675]
3/23/95	95	Filed Appellees Matsushita Acquis, Matsushita Electric, and Matsushita Holding objection to aplts' bill of costs, served on 3/20/95 [92-55675, 92-55677] (sa) [92-55675 92-55677]
3/31/95	96	Filed Appellants Lawrence Epstein et al. reply in spt of bill of costs; served on 3/30/95 [92-55675, 92-55677] (sa) [92-55675 92-55677]
4/6/95	99	Filed order (William A. NORRIS, Charles E. WIGGINS, Diarmuid F. O'SCANNLAIN, Charles E. WIGGINS,): The

DATE	NO.	PROCEEDINGS
		petition for rehearing is denied and the suggestion for en banc is rejected. in 92-55632, 92-55675 [92-55632, 92-55675] (wp) [92-55632 92-55675]
4/12/95	100	Filed aples' FAXED mtn to stay mandate pending application for certiorari. (WAN) served on 4/12/95 [2770912] (rc) [92-55632 92-55675]
4/14/95	101	Filed Appellants Lawrence Epstein et al. oppn to appellees' motion to stay the mandate (WAN by fax); served on 4/13/95 [92-55675, 92-55632] (sa) [92-55632 92-55675]
5/4/95	102	Received atty for Appellees MCA, Inc., et al., letter dated 05/03/95 re: appellees today filed their petition for a writ of certiorari, which was submitted 63 days prior to the expiration of the time within which to file the petition under Rule 13 of the Rules of the Supreme Court... (PANEL) [92-55632, 92-55675] (hh) [92-55632 92-55675]
5/10/95	103	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-1809 filed on 5/3/95. [92-55675] (ah) [92-55675]
5/24/95	104	Received ltr dated 5/23/95 from Henry P. Monagham for Aplt Lawrence Epstein re:... We desire to proceed in the d.c in accordance with the orders authorized by this ct; entry of partial summary judgment and class certification; served on 5/23/95 (See ltr for complete text) (Panel) [92-55675] (gva) [92-55675]

DATE	NO.	PROCEEDINGS
6/5/95	105	Filed order (William A. NORRIS,): Upon due consideration of aples mtn for stay of the mandate pending the filing of a petition for cert, such petition to filed within 30 days of this order. It is ordered that the mtn for stay of mandate be granted. [2770912-1] in 92-55675 [92-55632, 92-55675] (wp) [92-55632 92-55675]
6/23/95	106	Received notice from Supreme Court, petition for certiorari GRANTED on 6/19/95. Supreme Court No. 94-1809. granting motion of Business Roundtable to file AC brief. (ah) [92-55675]

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE EPSTEIN, *et al.*,)
Plaintiff,)
vs.) No. CV90-6451-R
MCA, INC., *et al.*,)
Defendants.)

[Above caption inserted]

DECLARATION OF BRADFORD CORNELL

I, BRADFORD CORNELL, declare as follows:

1. I am Professor of Finance and Director of the Security Pacific Research Foundation, Anderson Graduate School of Management, at UCLA. I received from Stanford University a B.S. degree in physics and philosophy in 1970, an M.S. degree in statistics in 1974, and a Ph.D. in financial economics in 1975. A summary of my professional qualifications and a list of my publications in academic journals is attached as Exhibit E to this declaration.

2. I have served as an expert witness in a large number of cases involving the disputed valuation of securities and other assets. In a number of these cases, I have presented testimony, either orally or by declaration, on behalf of plaintiff shareholders challenging allegedly preferential or unfair terms of securities transactions.

3. I have been retained by defendant MCA INC. ("MCA") to compare the value of the preferred stock ("Holdings Preferred") to be received by defendant Mr. Lew R. Wasserman ("Wasserman") to the $66 in cash per share of common stock offered in to the Matsushita tender offer. In

undertaking this work, I have relied on factual information regarding the Matsushita transactions including the text of the Capital Contribution and Loan Agreement and other exhibits to the Declaration of Ernest T. Kaufmann in support of plaintiff's motion for summary judgment in this action, dated December 15, 1990.

* * *

18. In light of the huge losses that interference with the transaction could impose on shareholders, economic theory suggests that aggregate shareholder wealth would be maximized if the transaction were consummated; and assuming that legal violations were established, investors could sue for money damages. Based on my experience testifying as an expert witness regarding calculation of plaintiffs' damages in a number of securities actions, I believe such damages could be calculated in a relatively straightforward manner. Shareholders will know exactly how much capital gains tax they have paid as a result of receiving the tender offer price of $66. The extent of tax deferral or elimination that the preferred stock could have created can be determined by referring to standard actuarial calculations. While a number of additional issues might have to be considered, I believe that an appropriate measure of damages for any legal violation could be readily developed without any greater expenditure of judicial resources than is normally required in securities litigation.

19. For Matsushita to issue preferred stock, instead of issuing debt and paying cash for the outstanding common shares, would impose huge costs on Matsushita because preferred dividends, unlike interest payments, are not tax deductible. To estimate these costs I assume, based on the Offer to Purchase dated November 30, 1990, that Matsushita planned to finance the transaction by using $1 billion of its internal funds and issuing $5.2 billion in debt. For simplicity, I assume that the average cost of this debt will be 8.75 percent, the same as the yield on the preferred stock. Because Matsushita intends to raise the funds by issuing commercial paper, this assumption is conservative. Yields on the highest rated commercial paper are currently below 8.5 percent.

Furthermore, Matsushita has the highest credit rating and can raise funds both in the United States and Japan to refinance the commercial paper when it matures.

20. Assuming that the corporate tax rate is 34 percent, the annual tax cost for Matsushita from issuing preferred stock rather than debt is $154,700,000. The present value of this annual tax cost is computed using the after-tax cost of funds for horizons of 5, 8 and 15 years. As shown in Exhibit D, the present values are $655,660,000 for 5 years, $969,268,000 for 8 years and $1,524,822,000 for 15 years.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at Los Angeles, California, on December 26, 1990.

/s/

Bradford Cornell

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE MANUEL J. REAL,
CHIEF JUDGE PRESIDING

LAWRENCE EPSTEIN,)
Plaintiff,)
vs.) No. CV90-6451-R
MCA, INC., *et al.*,)
Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

TUESDAY, SEPTEMBER 3, 1991

10:00 A.M.

GEORGE A. HAAS, CSR, INC.
OFFICIAL COURT REPORTER
438 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 613-1228

* * *

[8]

The Epstein plaintiffs objected to the settlement in Delaware and said they would not participate in any way in those proceedings.

MR. KAUFMANN: I don't know what that means, your Honor.

There was no appearance at the hearing on behalf of the class plaintiffs. So there was no objection presented to the Court. There is no class.

THE COURT: There was notice given to the class.

MR. KAUFMANN: That's correct.

THE COURT: In Delaware.

MR. KAUFMANN: That's correct.

THE COURT: Okay.

MR. KAUFMANN: That correct. But nothing was approved, so nothing happened.

MR. OSTRAGER: I'd be happy to provide the Court with the proceedings from Delaware with regard to your Honor's request, the Delaware proceedings.

I think it's fair to say it ceased to be prosecuted because the Delaware judge said there was no basis for the state law claims which were being prosecuted in Delaware, because it is perfectly permissible under Delaware law for Mr. Wasserman to have sold his stock in exchange for preferred shares to

[9]

Mashushita.

The Delaware action is not being prosecuted in any way. There was notice sent out to the class in Delaware. Nobody other than these plaintiffs has come forward and requested anything of the Mashushita defendants. I think, with respect to what Mr. Kaufmann in addressing the Court has made clear, the fundamental problem with this case as a proposed class action is that none of these plaintiffs demonstrate the fact of injury and they are certainly not representative of anybody else in the world. So their claims are not typical.

Passing the question of whether these plaintiffs are adequate representatives, because they absolutely have refused in any way to respond to any of the discovery the defendants

have propounded, passing that issue, your Honor, what happened here is that Mashushita made an arrangement with Mr. Wasserman and then made a tender offer to the world at large. There are approximately 7,800 MCA shareholders who had an opportunity to participate in the tender offer. They exchanged their MCA shares of stock for cash and stock worth $71, at a time when the stock was trading for $34 a share. And the $71 is higher than the historic high of MCA shares.

* * *

[14]

THE COURT: The motion for class certification is denied.

Prepare the order, counsel.

MR. MAUSNER: Thank you.

MR. OSTRAGER: Thank you, your Honor.

MR. KAUFMANN: Thank you.

o0o

I certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

/s/ 9/5/91

GEORGE A. HAAS, CSR DATE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE EPSTEIN, JOHN LINDER, JANE ROCKFORD, as trustee of the Michael J. Rockford Trust, MAURICE KARLIN, RUTH KARLIN, BETH ANN KARLIN and BERT P. KARLIN, on behalf of themselves and all others similarly situated,	)	CV-90-6451-R
	)	*CLASS ACTION*
Plaintiffs,	)	CONSOLIDATED AMENDED COMPLAINT FOR VIOLATION OF FEDERAL SECURITIES LAWS
v.	)	
MCA INC., MATSUSHITA ACQUISITION CORP., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORPORATION, SIDNEY J. SHEINBERG, and LEW R. WASSERMAN,	)	*JURY TRIAL DEMANDED*
Defendants.	)	

Plaintiffs for their Consolidated Amended Complaint allege upon information and belief, except as to those allegations which pertain to the named plaintiffs and counsel, as follows:

JURISDICTION AND VENUE

1. This is a class action which arises under Sections 10(b), 14(d), and 14(e), and 20 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. Sections 78j(b), 78n(d), 78n(e), and Rules 10b-13 (17 CFR § 240.10b-13) and 14d-10 (CFR, § 240.14d-10) promulgated thereunder by the Securities and Exchange Commission. Jurisdiction is founded on Section 27 of the Exchange Act, 15 U.S.C. Sec.78aa.

2. Certain of the defendants reside in this district and have their principal places of business here. Many of the acts and transactions constituting the violations of law complained of occurred in this district.

THE PARTIES

3. The plaintiffs herein were common stockholders of MCA and are members of the class as hereinafter defined, having owned shares of MCA common stock until at least November 30, 1990. Plaintiffs thereafter duly tendered or caused to be duly tendered all such shares in response to the Offer to Purchase pursuant to the Tender Offer complained of herein. Such tender of plaintiffs' MCA stock was not an acquiescence in any of the wrongs complained of herein. The other stockholders of MCA, including plaintiffs and excluding defendant Lew Wasserman ("Wasserman"), one David Geffen ("Geffen"), and defendant Sidney Sheinberg ("Sheinberg"), are hereinafter referred to as the "other stockholders".

4. Defendant MCA Inc. ("MCA") was at all relevant times a publicly held company whose common stock was listed and traded on the New York Stock Exchange. MCA is incorporated under the laws of the State of Delaware and has its principal offices in Universal City, California. MCA has no properties or employees in Delaware and Delaware citizens owned only a nominal amount of MCA's common stock. Prior to the Tender offer complained of, MCA had about 7,800 stockholders and about 77,700,000 shares of common stock outstanding. MCA is a diversified leisure and entertainment company and a major provider of movies and television programs and theatrical films. MCA's other interests include the Universal Studio's Tour in California, recorded music, retail and mail order merchandising, and book publishing.

5. Defendant Wasserman was and is the Chairman of the Board and Chief Executive Officer of MCA, owned about 4,953,992 shares of MCA's stock (6.7%), and may have been deemed to have had shared voting and investment power in about 18.2% of MCA's stock.

6. Defendant Sheinberg was and is President and Chief Operating Officer of MCA and owned about 1,179,635 shares of MCA's stock.

7. Wasserman and Sheinberg, and each of them, controlled MCA's dealing with Matsushita and benefitted directly from these dealings with Matsushita through their control of MCA.

8. Defendants Matsushita Acquisition Corporation ("Matsushita Acquisition") and Matsushita Holding Corporation ("Matsushita Holding") are Delaware corporations formed by defendant Matsushita Electric Industrial Corporation, Ltd. ("Matsushita") (hereinafter sometimes, collectively, as the "Matsushita companies" or "Matsushita"), a Japanese corporation, for the purpose of making a Tender Offer for the stock of MCA and thereafter acquiring MCA by merger. Matsushita Acquisition was the wholly owned subsidiary of Matsushita Holding and Matsushita Holding is, in turn, the wholly owned subsidiary of Matsushita.

CLASS ACTION ALLEGATIONS

9. Plaintiffs bring this action as a "(b)(3)" class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of all persons similarly situated, namely, the other stockholders of MCA (excluding, however, any defendants herein; any directors, officers, employee, partners, agent, advisors or representatives of any defendant; any relative (by blood or marriage) of any defendant; and any trust for the benefit of any of the foregoing), who owned MCA common stock on or after November 26, 1990 and tendered such shares pursuant to the Offer to Purchase the common stock of MCA that was the subject of a Tender Offer (which was publicly announced by MCA and Matsushita on November 26, 1990) by defendant Matsushita through its wholly owned subsidiaries, including defendant Matsushita Acquisition, and defendant Matsushita Holding, for all the common stock of MCA. Members of the class are so numerous that joinder of all members is impracticable in that over 77,700,000 shares of the common stock of MCA were subject to the Tender Offer,

of which about 97% were purchased on December 29, 1990 in and pursuant to the Tender Offer.

10. Questions of fact and law common to the members of the class exist and predominate over any questions affecting only individual members of the class. Among the questions of law and fact common to the class are:

(a) whether in and pursuant to the Matsushita Tender Offer, the other stockholders of MCA: (i) were given the same right as Wasserman, Geffen, and Sheinberg to elect among each of the types of consideration offered in and pursuant to the Tender Offer; and (ii) have been given the highest type of consideration paid to any security holder in and pursuant to the Tender Offer.

(b) whether the purchase of, and the arrangement by the Matsushita companies to purchase, the shares of MCA common stock owned by Wasserman and Sheinberg were otherwise than pursuant to the Matsushita Tender Offer.

(c) whether such Tender Offer violated SEC Rules 10b-13 (prohibiting other purchases during Tender Offer) and 14d-10 (the best price rule); (d) whether the Matsushita Tender Offer has damaged plaintiffs and the members of the class.

11. The claim of the plaintiffs is typical of the claims of the class as all class members sustained injury and damages arising out of the defendants' acts and transactions alleged herein.

12. The plaintiffs will fairly and adequately protect the interests of the class and have retained counsel competent and experienced in class and federal securities litigation to further insure such protection.

13. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since the class is so numerous and its membership so widespread that joinder of all members is impractical. Furthermore, as individual damages may be relatively small, the

expense and burden of non-class litigation may very well make it impossible for many members otherwise to redress their wrongs.

FACTUAL BACKGROUND OF WASSERMAN'S SPECIAL ARRANGEMENT

(a) *The Tender Offer And Wasserman's Special Arrangement Were Simultaneously Negotiated.*

14. On September 4, 1990, Matsushita expressed its interest, through an agent, in acquiring MCA to Wasserman and Sheinberg. On or about September 25, 1990, it was publicly announced that Matsushita and MCA were engaged in discussions for MCA's acquisition.

15. Negotiations were conducted throughout the week of November 19, 1990. Wasserman and Sheinberg negotiated on behalf of themselves and MCA. The same lawyers represented both MCA and Wasserman and Sheinberg throughout negotiations.

16. As a condition to Matsushita making a Tender Offer for MCA, Matsushita insisted that it simultaneously be assured of acquiring Wasserman's and Sheinberg's MCA shares and that Wasserman and Sheinberg amend their existing employment agreements to assure their continuity in the management of MCA.

17. In the negotiations, Matsushita insisted that it would consummate the purchase of Wasserman's MCA shares only after it was assured that its Tender Offer for all of MCA's common shares would succeed. Wasserman insisted that Matsushita promise that it would not purchase any shares tendered in the Tender offer until after Matsushita had consummated the exchange of Wasserman's shares for Matsushita Holding's preferred stock.

18. On November 26, 1990, Matsushita and MCA publicly announced that Matsushita would acquire MCA pursuant to a Tender Offer for *all* of the outstanding shares of common stock of MCA. Wasserman's shares of MCA common stock

were not excluded from the Tender offer. To the contrary, they were expressly characterized in the Offer to Purchase, (which was dated, and formally commenced on, November 30, 1990), as shares subject to the Tender Offer. Matsushita Acquisition offered to pay in the Tender Offer $66 cash net to the other stockholders for each share of MCA stock tendered. Matsushita and MCA further stated in their announcement of the Tender Offer that an Offer to Purchase would issue no later than November 30, 1990, and would be followed by a merger of MCA and Matsushita.

19. Also on November 26, 1990, Matsushita simultaneously entered into a series of agreements in connection with and to effectuate the Tender Offer, including the following:

(a) Agreement and Plan of Merger by and among Matsushita, Matsushita Acquisition, Matsushita Holdings, and MCA providing that Matsushita Acquisition would make the Tender Offer for the outstanding shares of common stock of MCA and for the merger thereafter of MCA and Matsushita Acquisition ("Tender/Merger Agreement"); and

(b) Capital Contribution and Loan Agreement by and among Matsushita, Matsushita Holdings, and Wasserman, pursuant to which Wasserman agreed to exchange his MCA common stock for a new issue of preferred stock in Matsushita Holdings ("Wasserman Arrangement"). The amount of preferred stock to be received by Wasserman would be equal to the number of MCA shares tendered by him to Holdings times whatever price was paid in the Tender Offer. The preferred stock received by Wasserman would carry an annual dividend rate of 8.75 per cent, payable quarterly. As security for Wasserman, Matsushita agreed to contribute in cash 106% of the Tender Offer price (i.e., at a $66 Tender Offer Price, Matsushita would contribute $69.36) for every MCA share tendered by Wasserman. Wasserman's preferred stock was to be secured further by letters of credit, cash or United States obligations.

20. The Wasserman Arrangement was entered into simultaneously with the Tender/Merger Agreement, and the

Wasserman Agreement was a condition of the execution of the Tender/Merger Agreement.

21. Wasserman caused MCA to insist that, simultaneously with MCA entering the Tender/Merger Agreement, Matsushita enter into the Wasserman Arrangement.

22. Only one law firm, the same law firm, was appointed in the Tender/Merger Agreement and in the Wasserman Arrangement as the agent to receive notice for MCA and for Wasserman.

23. The only stockholders of MCA who were offered non-taxable, secured preferred stock of Matsushita Holdings for his MCA shares were Wasserman, Geffen and Sheinberg.

24. On November 25, 1990, MCA declared a dividend on share, a rate of about 1.1 per cent per annum, in contrast with the dividend rate of 8.75% paid on the non-taxable, secured preferred stock received by Wasserman.

(b) *The Tender Offer And The Wasserman Arrangement Were Integral And Mutually Conditional Parts Of A Single Plan For The Acquisition of MCA By Matsushita.*

25. The Wasserman and Sheinberg Arrangements and the transactions provided for therein (including the Offer to Purchase) were all transactions contemplated by the Tender/Merger Agreement.

26. The Tender/Merger Agreement and the Wasserman Arrangement were negotiated prior to and executed on November 26, 1990, as part of the over-all acquisition of MCA by Matsushita and were integral to, and mutually dependent and conditioned upon, each other.

27. The performance of the Wasserman Arrangement and the Tender/Merger Agreement were mutually interdependent. The Tender/Merger Agreement and the Wasserman Arrangement were negotiated simultaneously; they were executed simultaneously; the Tender Offer was publicly announced simultaneously with the public announcement of the

Arrangement to purchase Wasserman's shares; Wasserman negotiated for both the Tender/Merger Agreement and his Arrangement; neither the Tender/Merger Agreement nor the Wasserman Arrangement would have been executed without the other; the Tender Offer could not have been consummated prior to the consummation of the Wasserman Arrangement; at most, the Tender Offer was to be consummated simultaneously with the Wasserman Arrangement.

28. The Matsushita companies in the Offer to Purchase sought to purchase all of the MCA shares in a Tender Offer for "All Outstanding Common Stock of MCA".

29. The Wasserman and the Tender/Merger Agreement involved the same class of securities, namely, shares of MCA common stock, and were part of a single plan of acquisition by Matsushita of MCA.

30. The Tender Offer was subject to a condition that at least 50 percent of the MCA shares be tendered. In determining whether this condition had been satisfied, the Tender/Merger Agreement provided that shares of MCA "previously acquired by Parent [Matsushita]" are to be included in calculating the total number of shares tendered under the Tender Offer. Shares "previously acquired by Parent" included the shares of Wasserman referred to in the Wasserman Arrangement.

(c) *Timing: The Actual Purchase of Wasserman's Shares Occurred During The Tender Offer*

31. Pursuant to the Tender Offer, Matsushita Acquisition issued the Offer to Purchase dated November 30, 1990.

32. The Offer to Purchase stated that, unless Matsushita Acquisition extended the period of time for owners of MCA shares to tender their shares, shares could be tendered through 12:01 A.M., December 29, 1990, New York City time, (the "Expiration Date").

33. Following the Expiration Date, Matsushita Acquisition reserved the right to take any number of different actions

regarding the Tender Offer: it could, *e.g.*, extend the Tender Offer; amend the Tender Offer; withdraw the Tender Offer; purchase, by accepting for payment, shares tendered into the Tender Offer and terminate the Tender Offer; or consummate the Wasserman Arrangement and then consummate the acquisition of the Shares held by the members of the class.

34. Matsushita Acquisition represented in the Offer to Purchase that it would purchase the shares validly tendered in the Tender Offer by accepting tendered shares for payment.

35. The Offer to Purchase expressly stated that "purchase" of shares in the Tender Offer was to be accomplished by Matsushita Acquisition's notification to the Depositary of the acceptance of shares for payment. Thereafter, Matsushita Acquisition would "pay for" shares accepted for purchase (Offer to Purchase, p. 6; Tender/Merger Agreement, ¶ 1.01):

> "For purposes of the Offer, the Purchaser [Matsushita Acquisition] will be deemed to have accepted for payment pursuant to the Offer, and thereby have purchased, validly tendered Shares, if, as and when the Purchaser gives oral or written notice to the Depositary. . . ."

36. The Offer to Purchase did not specify any particular date or time within which Matsushita Acquisition was require to "accept for payment" and thereby purchase shares tendered. The Offer to Purchase stated:

> "Subject to the applicable regulations of the Commission and the terms of the Merger Agreement, the Purchaser expressly reserves the right, in its sole discretion, at any time and from time to time ... to ... extend the period of time during which the Offer is open and thereby delay acceptance for payment of, and the payment for, any Shares.
>
> * * *
>
> "Any extension, delay in payment, amendment or termination will be followed as promptly as practicable

by public announcement thereof, such announcement in the case of an extension to be issued no later than 9:00 a.m., New York City time, on the next business day after the previously scheduled Expiration Date (i.e., Monday, December 31, 1990) in accordance with Rules 14d-4(c), 14d-6(d), and 14e-1(d) under the Exchange Act.

* * *

"Shares tendered pursuant to the Offer may be withdrawn at any time prior to the Expiration Date and, unless theretofore accepted for payment by the Purchaser pursuant to the Offer, may be withdrawn at any time after January 28, 1991" (Offer to Purchase, pp. 5, 9).

37. The terms of the Wasserman Arrangement expressly provided that Wasserman's Shares were to be purchased before those of all other holders.

38. The Offer to Purchase stated that:

"The Parent and Holding have agreed in the [Wasserman Arrangement] that, *unless the transactions contemplated by the [Wasserman Arrangement] have been consummated*, neither Parent nor [Matsushita] Holding will authorize, cause or allow the purchase of Shares in the Offer. . ." (Offer to Purchase, pp. 3, 14, 31, emphasis added).

39. Section 5(a) of the Wasserman Arrangement accordingly stated (in relevant part):

"Each of MEI [Matsushita] and the Corporation [MCA] ... hereby covenants and agrees that, *unless and until* the Transactions have been consummated in accordance with the terms hereof, neither MEI nor the Corporation will authorize, cause or allow the purchase of any shares of MCA Common Stock pursuant to the Offer (as such term is defined in the Merger Agreement). . ." (emphasis added).

40. The Wasserman Special Arrangement thus contemplated an elapse of time between Matsushita's acceptance for payment and its payment for Shares other than Wasserman's, that is, between acceptance for payment and consummation of the tender offer by payment. Pursuant to the Wasserman Special Arrangement, Wasserman's Shares were to be exchanged tax-free during that elapse.

SHEINBERG'S SPECIAL ARRANGEMENT

41. Simultaneously with the execution of the Merger Agreement, Matsushita entered into a special Tender Agreement with Sheinberg in which Sheinberg agreed to tender his MCA stock pursuant to Matsushita's Tender Offer at the ostensible Tender Offer price of $66 per share.

42. In connection with entering into the Merger Agreement and as a condition to Matsushita's willingness to enter into the Merger Agreement, Sheinberg's employment agreement with MCA was amended on November 26, 1990. In ostensible connection with entering into such amended employment agreement, MCA paid Sheinberg the sum of $21,000,000.

43. Though ostensibly paid for other reasons, the sum of $21,000,000 constituted the payment of extra consideration to Sheinberg for his MCA stock (at least $16 per share) that he tendered to Matsushita pursuant to the Sheinberg Tender Agreement. The amount of $21,000,000 was designed to compensate Sheinberg for the income taxes that he would be required to pay in connection with tendering his MCA stock to Matsushita pursuant to the Sheinberg tender offer at the ostensible price of $66 per share.

44. Sheinberg's Special Arrangement (the payment of $21,000,000) was designed to make the sale of Sheinberg's MCA stock to Matsushita tax-free, just as Wasserman's Special Arrangement made the sale of Wasserman's MCA stock to Matsushita tax-free.

THE VIOLATIONS OF RULE 14d-10

45. SEC Rule 14d-10 provides:

"(a) No bidder shall make a tender offer unless:

* * *

"(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

* * *

"(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That:

(1) Security holders are afforded equal right to elect among each of the types of consideration offered..."

46. In the Matsushita Tender Offer, Matsushita and Matsushita Acquisition paid the other stockholders $66 per share in cash for their stock in MCA. Wasserman and Sheinberg were treated specially, differently, and more favorably than the other stockholders of MCA. Unlike the other stockholders of MCA, other than Geffen, only Wasserman and Sheinberg had the right to elect to receive for his MCA stock the preferred stock of Matsushita Holding in a tax-free exchange. And only Sheinberg received an additional payment (of $21 million) to defray his tax obligations.

47. In selling his MCA shares, Wasserman considered the tax-free preferred stock of Matsushita Holding to be consideration preferable to $66 in cash. If the taxable and tax-free consideration were truly equivalent, Wasserman would have been economically indifferent between them.

48. The Matsushita companies violated SEC Rule 14d-10 by offering and paying a type of consideration to Wasserman which was different from and of a higher value (tax-free preferred stock) than the $66 in cash being offered to the other

stockholders of MCA. Also in violation of Rule 14d-10, the other stockholders of MCA were not afforded the equal right to elect among the different types of consideration, regardless of their respective values, offered to Wasserman. Each plaintiff would have liked to enjoy his exclusively federal right to elect a type of consideration that would have defrayed his taxes. As a result, plaintiffs and the class have been damaged in an amount to be determined at trial.

THE VIOLATIONS OF RULE 10b-13

49. SEC Rule 10b-13 provides in pertinent part:

"(a) No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security (or any other security which is immediately convertible into or exchangeable for such security), otherwise than pursuant to such tender offer or exchange offer, from the time such tender offer or exchange offer is publicly announced or otherwise made known by such person to holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such tender offer or exchange offer may be the terms of such offer be accepted or rejected: *Provided, however*, That if such person is the owner of another security which is immediately convertible into or exchangeable for the security which is the subject of the offer, his subsequent exercise of his right of conversation or exchange with respect to such other security shall not be prohibited by this section.

50. The offer and payment of the preferred stock of Matsushita Holding to Wasserman in a tax-free exchange for his MCA stock and the offer and payment of an extra $21 million in cash to Sheinberg for his MCA stock violated Rule 10b-13 in that each constituted an arrangement to purchase their MCA stock, and the actual purchase thereof occurred, otherwise than pursuant to the Tender Offer from the time such

Tender Offer was publicly announced or otherwise made known to the holders of the security to be acquired until the expiration of the period, including any extensions thereof, during which securities tendered pursuant to such Tender Offer may be by the terms of such Tender Offer have been accepted or rejected.

51. The Matsushita companies' purchase of Wasserman's and Sheinberg's stock and the Matsushita Tender Offer were negotiated simultaneously, occurred at the same time, and each was conditioned on the other. The Matsushita companies agreed not to accept for purchase any shares in the Matsushita Tender Offer until the arrangements with Wasserman and Sheinberg were consummated. Defendants' violations of Rule 10b-13 damaged plaintiffs and the class in an amount to be determined at trial.

AIDING AND ABETTING

52. Defendants herein aided and abetted each other in the aforesaid violations of Rule 14d-10, and Rule 10b-13. Wasserman, Sheinberg and MCA caused the Matsushita companies to violate Rule 10b-13 and 14d-10 by refusing to participate in the Tender Offer unless the Matsushita companies treated Wasserman and Sheinberg specially, differently, and more favorably than the other stockholders of MCA, other than Geffen, by granting them the right in, pursuant to, and during the Tender Offer to receive the fully secured, non-taxable preferred stock of Matsushita Holding in a tax-free exchange, and also by offering and paying an extra $21 million to Sheinberg to defray his taxes.

53. As heretofore pleaded, defendants Wasserman and Sheinberg were also control persons of MCA with respect to the wrongs alleged within the meaning of Section 20 of the Exchange Act.

54. After the consummation of the Tender Offer on December 29, 1990, Matsushita acquired all of MCA on January 3, 1991, by a second-step merger in which Matsushita Acquisition was merged into MCA with the result that MCA

became the wholly owned subsidiary of Matsushita Holding which, in turn, is the wholly owned subsidiary of Matsushita.

55. As a result of the foregoing, plaintiffs and the class have been damaged in an amount to be determined at trial.

WHEREFORE, plaintiffs, on behalf of themselves and the other members of the class herein, demand judgment against defendants, and each of them, jointly and severally:

(1) Certifying this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure;

(2) Certifying plaintiffs as the class representatives;

(3) Awarding plaintiffs and the members of the class the damages, plus interest, that they have sustained by virtue of the improper and unlawful Tender Offer, or a cash premium to defray their taxes;

(4) Requiring plaintiffs and the members of the class the damages, plus interest, that they have sustained by virtue of the improper and unlawful Tender Offer;

(5) Awarding plaintiffs and the members of the class the costs of this suit, including reasonable attorneys' fees, accountants' and experts' fees and other disbursements; and

(6) Granting such other and further relief as the Court may deem appropriate.

Dated: April 22, 1991

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By: /s/
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JURY DEMAND

Plaintiffs respectfully demand a trial by jury.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE EPSTEIN, et al., Plaintiffs, v. MCA INC., MATSUSHITA ACQUISITION CORP., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORPORATION, SIDNEY J. SHEINBERG, and LEW R. WASSERMAN, Defendants.	CASE NO. CV-90-6451-R ANSWER OF DEFENDANTS MATSUSHITA ACQUISITION CORP., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. AND MATSUSHITA HOLDING CORPORATION TO CONSOLIDATED AMENDED COMPLAINT FOR VIOLATIONS OF FEDERAL SECURITIES LAWS

Defendants MATSUSHITA ACQUISITION CORP., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., and MATSUSHITA HOLDING CORPORATION (collectively, "Answering Defendants") hereby answer the Consolidated Amended Complaint for Violations of Federal Securities Laws (the "Complaint"), filed by plaintiffs Lawrence Epstein, John Linder, Jane Rockford, Maurice Karlin, Ruth Karlin, Beth Ann Karlin, and Bert P. Karlin (collectively, "Plaintiffs") in the above-entitled action, as follows:

JURISDICTION AND VENUE

1. Answering Defendants deny each and every allegation of paragraph 1.

2. Answering Defendants deny the allegations of paragraph 2, except as follows: Answering Defendants are informed and believe and, based thereon, allege that Defendants Wasserman and Sheinberg reside in this district, and that Defendant MCA has its principal place of business in this district.

THE PARTIES

3. Answering Defendants are without sufficient knowledge and information to form a belief as to the truth of the allegations of paragraph 3, and, basing their denial on that ground, deny the allegations of paragraph 3, except as follows: Answering Defendants are informed and believe and, based thereon, allege that some or all of the Plaintiffs tendered shares of MCA stock in response to the Tender Offer.

4. Answering Defendants deny the allegations of paragraph 4, except as follows: Answering defendants admit that MCA is incorporated under the laws of the State of Delaware and has its principal offices in Universal City, California.

5. Answering Defendants admit the allegations of paragraph 5.

6. Answering Defendants admit the allegations of paragraph 6.

7. Answering Defendants deny each and every allegation of paragraph 7.

8. Answering Defendants admit the allegations of paragraph 8.

CLASS ACTION ALLEGATIONS

9. Answering Defendants deny the allegations of paragraph 9, except as follows: Answering Defendants admit that Plaintiffs purport to bring this action as a class action.

10. Answering Defendants deny each and every allegation of paragraph 10.

11. Answering Defendants deny each and every allegation of paragraph 11, and specifically deny that Plaintiffs, or any member of any purported class, sustained any injury whatsoever.

12. Answering Defendants deny each and every allegation of paragraph 12.

13. Answering Defendants deny each and every allegation of paragraph 13, and specifically deny that Plaintiffs, or any member of any purported class, sustained any injury whatsoever.

14. Answering Defendants admit the allegations of paragraph 14.

15. Answering Defendants deny each and every allegation of paragraph 15.

16. Answering Defendants admit that the making of the Tender Offer was conditioned upon Wasserman's separate commitment to sell his shares in a distinct transaction, that they desired to have Wasserman and Sheinberg continue in the management of MCA. Except as expressly so admitted, Answering Defendants deny each and every allegation of paragraph 16.

17. Answering Defendants deny the allegations of paragraph 17, except as follows: Answering defendants admit that the consummation of the Contribution Agreement was conditioned on the acceptance for payment of shares pursuant to the Offer to Purchase.

18. Answering Defendants deny each and every allegation of paragraph 18.

19. Answering Defendants deny the allegations of paragraph 19, except as follows: Answering Defendants admit that the Merger Agreement and the Contribution Agreement were entered into on November 26, 1990 and that the terms of those Agreements are as set forth therein and not otherwise.

20. Answering Defendants deny the allegations of paragraph 20, except as follows: Answering Defendants admit that the Contribution Agreement and Merger Agreement were entered into on the same day and that the Merger Agreement was conditioned on the execution of the Contribution Agreement.

21. Answering Defendants deny each and every allegation of paragraph 21.

22. Answering Defendants deny the allegations of paragraph 22, except as follows: Answering Defendants admit that Wachtell, Lipton, Rosen & Katz was the law firm designated to receive a copy of any notice sent to MCA or Mr. Wasserman.

23. Answering Defendants deny each and every allegation of paragraph 23.

24. Answering Defendants deny the allegations of paragraph 24, except as follows: Answering defendants admit and allege that on November 25, 1990 MCA declared a dividend on its common stock.

25. Answering Defendants deny the allegations of paragraph 25, except as follows: Answering Defendants admit that the Merger Agreement references both the Contribution Agreement and the Tender Agreement between Matsushita Electric Industrial Co., Ltd. and Mr. Sheinberg.

26. Answering Defendants deny each and every allegation of paragraph 26.

27. Answering Defendants deny each and every allegation of paragraph 27.

28. Answering Defendants deny the allegations of paragraph 28, except as follows: Answering Defendants admit and allege that terms of the Offer to Purchase are as set forth therein and not otherwise.

29. Answering Defendants deny the allegations of paragraph 29, except as follows: Answering Defendants admit that

the Contribution Agreement and the Merger Agreement both pertained to the same class of securities.

30. Answering Defendants deny the allegations of paragraph 30, except as follows: The terms of the Offer to Purchase and the Merger Agreement are as set forth therein and not otherwise.

31. Answering Defendants deny the allegations of paragraph 31, except as follows: Answering Defendants admit that Matsushita Acquisition Corp. disseminated the Offer to Purchase dated November 30, 1990.

32. Answering Defendants deny the allegations of paragraph 32, except as follows: The terms of the Offer to Purchase are as set forth therein and not otherwise.

33. Answering Defendants deny each and every allegation of paragraph 33.

34. Answering Defendants deny the allegations of paragraph 34, except as follows: Answering Defendants admit that the terms of the Offer to Purchase are as set forth therein and not otherwise.

35. Answering Defendants deny the allegations of paragraph 35, except as follows: Answering Defendants admit that the terms of the Offer to Purchase are as set forth therein and not otherwise.

36. Answering Defendants deny the allegations of paragraph 36, except as follows: Answering Defendants admit that the terms of the Offer to Purchase are as set forth therein and not otherwise.

37. Answering Defendants deny each and every allegation of paragraph 37.

38. Answering Defendants deny the allegations of paragraph 38, except as follows: Answering Defendants admit that the terms of the Offer to Purchase are as set forth therein and not otherwise.

39. Answering Defendants deny the allegations of paragraph 39, except as follows: Answering Defendants admit that the terms of the Contribution Agreement are as set forth therein and not otherwise.

40. Answering Defendants admit that "acceptance for payment" and "payment" are distinct events. Wasserman received the preferred stock after the expiration of the Tender Offer Period (i.e., after the shares were accepted for payment). Except as expressly so admitted, Answering Defendants deny each and every allegation of paragraph 40.

41. Answering Defendants deny the allegations of paragraph 41, except as follows: Answering Defendants admit that Matsushita entered into a Tender Agreement with Mr. Sheinberg.

42. Answering Defendants deny the allegations of paragraph 42, except as follows: Answering Defendants admit that Mr. Sheinberg entered into an amended employment agreement on November 26, 1990.

43. Answering Defendants deny each and every allegation of paragraph 43.

44. Answering Defendants deny each and every allegation of paragraph 44.

45. Answering Defendants deny the allegations of paragraph 45, except as follows: Answering Defendants admit and allege that the language of SEC Rule 14(d)-10 includes the language alleged in paragraph 45.

46. Answering Defendants deny each and every allegation of paragraph 46.

47. Answering Defendants deny the allegations of paragraph 47, except as follows: Answering Defendants are informed and believe and, based thereon, allege that Wasserman considered the preferred stock preferable based upon his individual tax planning and estate needs.

48. Answering Defendants deny each and every allegation of paragraph 48, and specifically deny that Plaintiffs and/or any purported class member were damaged in any amount.

49. Answering Defendants deny the allegations of paragraph 49, except as follows: Answering Defendants admit and allege that the language of SEC Rule 10(b)-13 is as set forth therein and not otherwise.

50. Answering Defendants deny each and every allegation of paragraph 50.

51. Answering Defendants deny each and every allegation of paragraph 51.

AIDING AND ABETTING

52. Answering Defendants deny each and every allegation of paragraph 52.

53. Answering Defendants deny the allegations of paragraph 53, except as follows: Answering Defendants incorporate paragraphs 5 and 6 hereof as if set forth in full.

54. Answering Defendants deny the allegations of paragraph 54, except as follows: Answering Defendants admit that Matsushita acquired all of MCA on January 3, 1991 by a second-step merger in which Answering Defendant Matsushita Acquisition was merged into MCA and MCA became the wholly-owned subsidiary of Answering Defendant Matsushita Holding.

55. Answering Defendants deny each and every allegation of paragraph 55, and specifically deny that Plaintiffs and/or the purported class were damaged in any amount.

FIRST AFFIRMATIVE DEFENSE

56. The Complaint fails to allege facts sufficient to state any claim upon which relief can be granted against Answering Defendants, or any of them.

SECOND AFFIRMATIVE DEFENSE

57. There is no private right of action under the statutes and regulations on which Plaintiffs and the alleged class purport to bring suit.

THIRD AFFIRMATIVE DEFENSE

58. All privately-negotiated arrangements between Answering Defendants, Wasserman and Sheinberg were fully disclosed at or before the commencement of the Tender Offer. Plaintiffs, with knowledge of these disclosures, tendered their shares pursuant to the Tender Offer. As a result, Plaintiffs have waived their right to assert each and every claim for relief contained in the Complaint.

WHEREFORE, Answering Defendants pray for judgment against Plaintiffs as follows:

1. That no class be certified and that this action be immediately dismissed;

2. That Plaintiffs take nothing by reason of this action; and

3. For such other and further relief as the Court deems just and proper.

DATED: May 20, 1991

GREENBERG, GLUSKER, FIELDS,
CLAMAN & MACHTINGER

By: /s/
ROBERT S. CHAPMAN
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAWRENCE EPSTEIN, on behalf of himself and all others similar situated, Plaintiff, v. MCA Inc., et al., Defendants.	CASE NO. CV-90-6451-R CASE NO. CV 91-0336-R (Consolidated Cases) *Class Action* Pre-Trial Order
WALTER MINTON, Plaintiff, v. MCA Inc., et al., Defendants.	Pre-Trial Conference: Date: January 27, 1992 Time: 10:00 a.m. Place: Courtroom 8

Following pre-trial proceedings, pursuant to Rule 16, F.R. Civ. P. and Local Rule 9,

IT IS ORDERED:

1. THE PARTIES ARE:

Putative Class Plaintiffs:

Lawrence Epstein, John Linder, and Jane Rockford as Trustee of the Michael J. Rockford Trust, on behalf of themselves and all others similarly situated. (Matsushita objects to designation of any plaintiffs as class plaintiffs on the ground that no class has been certified and states that on April 1 and September 3, 1991 the court denied motions to certify a class.)

Individual Plaintiff:

Walter Minton

David Minton and Andrew Minton will file a motion to intervene in this action.

Defendants:

Matsushita Electric Industrial Co., Ltd. ("MEI"), Matsushita Acquisition Corp. and Matsushita Holding Corp. (collectively "Matsushita").

Each of these parties has been served and has appeared. All Matsushita defendants and Minton stipulate that answers by Matsushita Acquisition and Matsushita Holding to the Minton complaint are deemed to be answers by MEI to Minton's complaint. All other parties named in the pleadings and not identified in the preceding paragraphs are now dismissed without prejudice to plaintiffs' right to appeal the court's decision regarding former defendants MCA, Wasserman and Sheinberg.

The pleadings that raise the issues are:

a. Consolidated Amended Complaint filed April 22, 1991.

b. Minton's complaint filed January 17, 1991. The *Minton* action was consolidated with the previously consolidated actions on April 23, 1991.

c. Answer of the Matsushita defendants to Consolidated Amended Complaint filed May 20, 1991.

d. Answer of the Matsushita defendants to the Minton complaint filed February 27.

2. FEDERAL JURISDICTION AND VENUE ARE INVOKED UNDER Section 27 of the Securities and Exchange Act of 1934 ("the Exchange Act"), 15 U.S.C. § 78aa. Many of the acts and transactions constituting the violations of law alleged in the Consolidated Amended Complaint occurred in this district. The facts requisite to federal jurisdiction are

admitted. With respect to Plaintiffs' claim alleged under SEC Rule 10b-13, Matsushita does not admit that acts took place in this district, or facts requisite to jurisdiction, because no private right of action exists under that provision. Matsushita further states that pursuant to the terms of the Offer to Purchase, Matsushita Acquisition Corp. merged into MCA Inc. on January 3, 1991 and its existence as a separate corporate entity ended.

3. THE PARTIES ESTIMATE THAT THE TRIAL WILL TAKE 7 trial days once a jury has been empaneled.

4. THE TRIAL WILL BE TO a jury. (Class plaintiffs contend that two juries should be empaneled, one to consider putative class issues; the other empaneled to consider the issues presented by the individual suitor, Walter Minton. Matsushita contends that such an arrangement is unnecessary and unjustifiable.) At least one week prior to trial date, each counsel shall deliver to court and opposing counsel: (a) proposed jury instructions as required by local rule 13.2; and (b) any special questions requested to be put to prospective jurors on voir dire.

5. THE FOLLOWING FACTS ARE ADMITTED AND REQUIRE NO PROOF:

1. This case arises out of the acquisition of MCA in late 1990 by MEI and its affiliates, defendants herein, for cash consideration of approximately $6 billion, plus other consideration in the form of an ongoing equity interest in TV station WWOR ("Matsushita Tender Offer"). MCA securities were registered on a national exchange, and the Matsushita Tender Offer used instrumentalities of interstate commerce, the mails and the facilities of a national exchange. On or about November 26, 1990, MCA had approximately 7,800 shareholders.

2. Defendants Matsushita Acquisition Corp. and Matsushita Holding Corp. are Delaware corporations formed by defendant MEI, a Japanese corporation, for the purpose of making a tender offer for the common stock of MCA. The Merger Agreement between MEI and MCA provided that Matsushita Acquisition Corp. would make a cash tender offer

for the outstanding shares of common stock of MCA and that thereafter Matsushita Acquisition Corp. would merge with and into MCA. Upon the completion of the Tender Offer, Matsushita Acquisition Corp. was merged with and into MCA. The Merger Agreement also provided for MCA to spin-off to its shareholders pro rata the company that owns WWOR-TV. MCA continues as the surviving corporation and is a wholly-owned subsidiary of MEI.

3. MCA is a Delaware corporation having its principal place of business in Los Angeles, California.

4. Lew R. Wasserman is the Chairman of the Board of Directors and Chief Executive Officer of MCA. As of November 26, 1990, Wasserman directly owned approximately 4,953,927 shares of MCA common stock and may be deemed to have had shared voting and investment power with respect to approximately 15% of the outstanding shares of the common stock of MCA. Wasserman's basis in that stock was approximately 3 cents per share. As of September 1990, Wasserman was 77 years of age.

5. Sidney J. Sheinberg is President and Chief Operating officer of MCA. Immediately prior to the tender offer, Sheinberg owned approximately 1,179,635 shares of MCA common stock.

6. On April 18, 1990, non-party David Geffen acquired 921,914 shares of MCA Series B Participating Convertible Preferred Stock and 621,684 shares of MCA common stock in the acquisition by MCA of The David Geffen Company. Each share of preferred stock was convertible into 10 shares of MCA common stock. The underlying shares of MCA common stock were restricted as follows: approximately 25% of such shares could be sold annually over a four-year period, but sales could not give buyers more than a 2% stake in MCA. These restrictions were waived in connection with the Tender Offer.

7. Plaintiffs Lawrence Epstein, John Linder and Jane Rockford purport to bring this action individually and on behalf of a class of all persons who owned MCA stock and

tendered such stock pursuant to the tender offer announced on November 26, 1990. Class certification was denied on April 1 and September 3, 1991. Rule 23, Fed. R. Civ. P., and applicable law permit the amendment or alteration of orders respecting the issue of certification.

8. Plaintiff Walter Minton filed an individual complaint on January 18, 1991, alleging claims substantially identical to those alleged by the other Plaintiffs.

9. The *Minton* action was consolidated with the previously-consolidated actions on April 23, 1991.

10. Matsushita wanted to acquire all of MCA's stock, including Wasserman's MCA stock. Matsushita made it clear throughout the course of negotiations that it would not go forward with any acquisition transaction without the prior commitments of Wasserman, Sheinberg, and Geffen, the three largest individual holders of MCA stock, to sell their shares to Matsushita.

11. MCA retained Lazard Freres & Co. as its investment banker. MCA retained Lazard on a largely contingent arrangement whereby Lazard's fee depended upon the consummation of the transaction.

12. Matsushita retained Allen & Company as its investment banker.

13. Wasserman's exchange of his MCA stock for preferred stock in Matsushita Holding Corp. constituted a tax-free transaction that was intended to meet his individual tax planning and estate needs.

14. Defendants have never offered the right to elect a tax-free exchange to all holders of MCA common stock.

15. All MCA shareholders who tendered, including plaintiffs, sold MCA common stock.

16. Matsushita Acquisition Corp., the bidder, filed a Schedule 14D-1 with the SEC on November 30, 1990.

17. The Capital Contribution Agreement was executed by the parties thereto after 12:01 a.m. on November 26, 1990. Wasserman exchanged his MCA common stock for preferred stock in Matsushita Holding Corp. after 12:01 a.m. on December 29, 1990.

18. The Tender Agreement and Employment Agreement between Sheinberg and Matsushita were executed by the parties thereto after 12:01 a.m. on November 26, 1990. Sheinberg received a payment on December 31, 1990.

19. After 12:01 a.m., but prior to 12:05 a.m., on December 29, 1990, attorneys for Matsushita telephoned Citibank, N.A., the depositary for the Tender Offer, to determine whether over 50 percent of the shares had been validly tendered. The depositary informed Matsushita that ninety-one percent of all MCA shares were tendered by that time. At 12:05 a.m. on December 29, 1990, Matsushita accepted for payment shares tendered pursuant to the Tender offer.

20. Matsushita then accepted the tendered shares for payment by telecopying a notice of acceptance for payment to the depositary. Pursuant to the Offer to Purchase, Matsushita Acquisition Corp. paid $66 per share, net to the seller in cash, plus a Spinoff Dividend in WWOR-TV, to all MCA shareholders who tendered their shares in the Tender Offer, upon the terms and conditions set forth in the Offer to Purchase.

21. Time-Stamped receipts clearly demonstrate that the Contribution Agreement was consummated at l[illegible] a.m. on December 29, when Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding Corp.

6. THE FOLLOWING FACTS, THOUGH STIPULATED, SHALL BE WITHOUT PREJUDICE TO ANY EVIDENTIARY OBJECTION:

1. MEI may be deemed to have been in control of the Delaware subsidiaries at all relevant times. The Delaware subsidiaries took no actions which were not directed by MEI.

2. In late August 1990, Matsushita authorized Ovitz, acting as Matsushita's agent, to express to Wasserman and Sheinberg Matsushita's interest in a potential acquisition of MCA.

3. On September 19, 1990, Ovitz met with Sheinberg and Lazard, MCA's investment banker, respecting Matsushita's interest in MCA. During this meeting Ovitz, as agent for Matsushita, stated that Matsushita was contemplating a price in the range of $75 to $90 per share subject to various terms and conditions.

4. Counsel for MCA negotiated Wasserman's Capital Contribution Agreement without charge to Wasserman. Wasserman negotiated for both MCA and himself. The same law firm represented MCA and Wasserman (without charge to Wasserman).

5. Lazard Freres & Co., advisors to MCA, and Allen & Company, advisors to MEI, set the terms of the preferred stock received by Wasserman in order to insure that the preferred stock was not more valuable than $66 in cash per share without taking the tax benefit to Wasserman into account.

6. Final negotiations regarding the potential acquisition of MCA by MEI, including price term, were conducted during the week of November 19, 1990.

7. It would have been more expensive for Matsushita to issue as the consideration for the acquisition preferred securities instead of cash.

8. Pursuant to the terms of the Contribution Agreement, the exchange contemplated thereby could only take place *after* Matsushita Acquisition Corp. accepted for payment shares tendered in the tender offer and that is in fact what occurred.

7. THE FOLLOWING ISSUES OF FACT, AND NO OTHERS, REMAIN TO BE LITIGATED AT THE TRIAL:

Matsushita states that no factual issues remain for trial and Matsushita is entitled to summary judgment as a matter of law. Subject to the positions advanced by the parties in

connection with the pending motions and subject to the disposition made by the Court in connection with the *in limine* motions described in paragraph 13 of this Order, the parties submit that the following issues remain for trial:

In preparing this schedule the parties present only the ultimate issues and do so without prejudice to their entitlement to offer whatever evidence they believe is relevant to such issues:

1. Was the arrangement to pay preferred stock to Wasserman "pursuant to" the tender offer?

2. Was the arrangement to pay $21 million to Sheinberg "pursuant to" the tender offer?

3. Was the preferred stock that Wasserman received in exchange for his common stock paid "during the tender offer" for purposes of Rule 14d-10?

4. Was the $21 million payment to Sheinberg paid "during the tender offer" for purposes of Rule 14d-10?

Plaintiffs contend, but the Matsushita defendants do not agree, that the following additional issues of fact also remain to be litigated:

1. Did Matsushita corrupt Wasserman or Sheinberg from their duties to obtain the maximum and highest consideration for all MCA shareholders?

2. Did it cost Matsushita more to issue the preferred stock to Wasserman than it did to finance the cash purchases of all other shares, and if so, by how much?

3. Was Matsushita unjustly enriched by its alleged violations of law, and if so, by how much?

4. Did defendants aid and abet each other?

5. Did Matsushita make misrepresentations or omissions in violation of Section 14(e)?

6. Did Wasserman receive higher consideration for his shares than other MCA shareholders?

7. Did Sheinberg receive higher consideration for his shares than other MCA shareholders? (The Matsushita defendants contend that with respect to Plaintiffs' additional issues of fact Nos. 6 and 7, whether Wasserman or Sheinberg received "higher consideration" becomes relevant if, and only if, they received higher payments which were during the tender offer period and/or pursuant to the tender offer).

8. Was the arrangement to pay preferred stock to Wasserman part of the tender offer?

9. Was the arrangement to pay $21 million to Sheinberg part of the tender offer?

10. Did the arrangement to pay preferred stock to Wasserman constitute a variance of the tender offer pursuant to Section 14(d) (7)?

11. Did the arrangement to pay $21 million to Sheinberg constitute a variance of the tender offer pursuant to Section 14(d) (7)?

8. THE FOLLOWING ISSUES OF LAW, AND NO OTHERS, REMAIN TO BE LITIGATED AT TRIAL:

1. Whether the Matsushita defendants violated Rule 14d-10 or any of the provisions of law that are alleged in the Consolidated Action?

2. What is or what are the appropriate measures of damages, if any?

Matsushita defendants contend, but Plaintiffs do not agree, that the following additional issues of law also remain to be litigated:

1. Whether there is a private right of action under the provisions of law that are alleged in the Consolidated Amended Action.

2. Whether any of the Plaintiffs has standing to prosecute this action or has suffered any legally cognizable injury?

Plaintiffs contend, but the Matsushita defendants do not agree, that the following additional issues of law also remain to be litigated:

1. Did defendants violate Rule 10b-13?

2. Did defendants violate Section 14(d) (7)?

3. Did defendants violate Section 14(e)?

4. Whether by operation of Internal Revenue Code §§ 351, 368 926 U.S.C. §§ 351, 368), the Wasserman Special Arrangement could not have been offered to all holders as an alternative to cash and still been tax-free to Wasserman unless the Matsushita acquisition entity exchanged solely voting stock for at least 80% of the outstanding shares of MCA?

5. Whether defendants corrupted Wasserman or Sheinberg from their duties to obtain the maximum and highest consideration for all MCA shareholders?

9. PLAINTIFFS CONTEND THE FOLLOWING DISCOVERY REMAINS:

a. Depositions of Simpson Thacher & Bartlett;

b. Deposition of Allen & Co.;

c. Depositions of Lazard Freres;

d. Depositions of Matsushita by authors of notes concerning Morgan Stanley valuations of MCA and by Ohashi;

e. Depositions of Adams and Rinehart;

f. Depositions of all parties' experts;

g. Production of documents by Matsushita for itself and for MCA;

h. Defendants' supplemental answers to expert interrogatories;

i. Defendants' answers to interrogatories;

j. Production of documents by Lazard Freres;

k. Further discovery concerning or arising out of the SEC investigation of matters concerning the tender offer.

(Matsushita disagrees with Plaintiffs' description of the discovery remaining to be completed and states that any deposition of Ohashi should occur in Japan, pursuant to court order.)

Matsushita contends that the following discovery from Plaintiffs remains outstanding:

(a) Production of Documents requested during depositions of the Karlin Plaintiffs, Plaintiff Rockford, Plaintiff Epstein and Plaintiff Linder (this is subject of a pending contempt motion) and Plaintiff Minton.

(b) Plaintiffs' responses to Matsushita's First Request for Production of Documents, served upon Plaintiffs on May 3, 1991;

(c) Plaintiffs' responses to Matsushita's First Set of Interrogatories, served upon Plaintiffs on May 3, 1991;

(d) Plaintiff's responses to Matsushita's First Set of Contention Interrogatories, served upon Plaintiffs on May 3, 1991;

(e) Plaintiffs' responses to Matsushita's First Set of Expert Interrogatories, served upon Plaintiffs on June 28, 1991;

(f) Plaintiffs' responses to Matsushita's revised Set of Contention Interrogatories, served upon Plaintiffs on June 28, 1991;

(g) Deposition of Plaintiff Jane Rockford;

(h) Deposition of Plaintiff Lawrence Epstein;

(i) Deposition of Plaintiff John Linder; and

(j) Deposition of Plaintiff Walter Minton.

(Plaintiffs disagree with Matsushita's description of the discovery remaining to be completed. In addition, all of the plaintiffs have been deposed. Class plaintiffs disagree that documents requested during depositions are the subject of a pending contempt motion.)

Matsushita contends the following discovery remains outstanding from Matsushita and non-parties:

(a) Deposition of Stephen E. Banner, Esq.

(b) Deposition of David Sorkin, Esq.

(c) Plaintiffs have completed the depositions of Wachtell Lipton, Allen & Co., Lazard Freres, David Geffen and Morgan Stanley. Matsushita has produced all documents responsive to Plaintiffs' discovery requests. Matsushita states that discovery from representatives of Simpson Thacher & Bartlett will proceed only after Matsushita has completed all discovery from Plaintiffs.

(Plaintiffs disagree with Matsushita's description of the discovery remaining to be completed.)

10. A PRELIMINARY JOINT EXHIBIT LIST OF THE PARTIES HAS BEEN FILED HEREWITH UNDER SEPARATE COVER AS REQUIRED BY LOCAL RULE 9.7. This list may be amended as discovery proceeds. *All exhibits may be admitted without objections, except those exhibits listed below*:

- Putative class plaintiffs and plaintiff Minton object to Defendants' Exhibits (designated in the joint exhibit list filed this date) Nos. 400 - 402 (inclusive), 406 - 421 (inclusive), 433 - 562 (inclusive), 564 - 603 (inclusive).

- Defendants object to Plaintiffs' Exhibits (designated in the joint exhibit list filed this date) Nos. 1, 5, 6, 7, 10, 16, 18, 20 - 22 (inclusive), 24 - 152 (inclusive), 156 - 160

(inclusive), 164, 265 - 302 (inclusive), 306 - 361 (inclusive). The objections are separately stated and filed herewith. In addition, the parties reserve the right to utilize all documents lodged with this Court in these consolidated proceedings to the extent permitted by the Federal Rules of Evidence.

11. EACH PARTY INTENDING TO PRESENT EVIDENCE BY WAY OF DEPOSITION TESTIMONY HAS MARKED SUCH DEPOSITION IN ACCORDANCE WITH LOCAL RULE 9.4.9 OR WILL DO SO PRESENTLY. The depositions taken herein may be used as fully as though signed pursuant to Rules 30, 32, Fed. R. Civ. P. The following deposition transcripts in addition to that designated by plaintiffs have been marked and lodged with the clerk as required by Local Rule 8.1.2 or will be lodged as soon as transcripts are available:

(a) Deposition of Lew R. Wasserman taken June 12, 1991;

(b) Deposition of Sidney J. Sheinberg taken June 19, 1991:

(c) Deposition of Paul M. Reinstein taken August 6, 1991;

(d) Deposition of Michael S. Ovitz taken August 26, 1991;

(e) Deposition of Keiya Toyonaga taken August 27, 1991;

(f) Deposition of Masahiko Hirata taken August 28, 1991;

(g) Deposition of Walter Minton taken September 5, 1991;

(h) Deposition of Herbert Allen taken September 12, 1991;

(i) Deposition of John Linder taken September 20, 1991;

(j) Deposition of Lawrence Epstein taken December 30, 1991;

(k) Deposition of Maurice J. Karlin taken September 24, 1991;

(l) Deposition of Martin Lipton, Esq. taken September 26, 1991;

(m) Deposition of Pamela Seymon, Esq. taken September 26, 1991;

(n) Deposition of Charles Cory taken November 21, 1991;

(o) Deposition of David Geffen taken December 12, 1991;

(p) Deposition of Scott Von Eschen taken October 2, 1991;

(q) Deposition of Felix Rohatyn taken October 3, 1991;

(r) Deposition of Jane Rockford taken December 5, 1991;

The parties reserve the right to supplement this list as further depositions are taken.

13. THE FOLLOWING LAW AND MOTION MATTERS AND MOTIONS *IN LIMINE* ARE PENDING OR MAY BE MADE:

A. *Plaintiffs*

1. Motion *in limine* respecting measure of damages.

2. Motion *in limine* respecting reference by defendants to other transactions.

3. Motion *in limine* to disqualify Simpson Thacher & Bartlett.

4. Motion *in limine* regarding findings concerning defendants' refusal to produce certain discovery.

5. Motion *in limine* compelling defendants to comply with outstanding document requests.

6. Renewed motion to certify the class.

7. Motion *in limine* regarding number of parties.

8. Motion to compel discovery.

9. Motion to preclude defendants' expert testimony.

10. Motion for reconsideration of defendants' protective order regarding Ohashi.

11. Motions for contempt order for failure to comply with a subpoena.

12. Minton motion to compel discovery.

13. Minton motion to intervene by David and Andrew Minton.

14. Minton motion *in limine* respecting the profits realized by Plaintiffs from the tender of MCA stock.

15. Plaintiffs reserve the right to make other motions or motions *in limine* at the appropriate time.

B. *Defendants*

The following law and motion matters and motions *in limine* are pending or contemplated:

(1) Motion for summary judgment;

(2) Motion to quash trial subpoena for Hirata;

(3) Matsushita contemplates filing a motion *in limine* to exclude any evidence relating to the following:

(a) Valuations of MCA by non-parties who were never retained by Matsushita, including, most particularly, Morgan Stanley;

(b) Pre-November 1990 price discussions;

(c) SEC investigations into possible insider trading allegations; and

(d) Matsushita reserves the right to make other motions *in limine* at the appropriate time.

14. BIFURCATION OF THE FOLLOWING ISSUES FOR TRIAL IS ORDERED: None.

15. THE FOREGOING ADMISSIONS HAVING BEEN MADE BY THE PARTIES, AND THE PARTIES HAVING SPECIFIED THE FOREGOING ISSUES OF FACT AND LAW REMAINING TO BE LITIGATED, THIS PRE-TRIAL CONFERENCE ORDER SHALL SUPERSEDE THE PLEADINGS AND GOVERN THE COURSE OF THE TRIAL OF THIS CAUSE, UNLESS MODIFIED TO PREVENT MANIFEST INJUSTICE.

Dated: January 27, 1992

/s/

United States District Judge

Approved as to form and content:

KAUFMAN MALCHMAN KAUFMANN & KIRBY
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By: */s/*

Ernest T. Kaufmann

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By: /s/
Brian L. Edwards

Attorneys for Defendants

(Signed subject to the objections set forth in the Declaration of Paul C. Curnin Regarding Pre-Trial Conference Order dated January 21, 1992, and filed under separate cover.)

No. 92-55675

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE EPSTEIN, et al.,

Plaintiff-Appellants,

v.

MCA, Inc., et al.,

Defendants-Appellees.

On Appeal From the United States
Court For The Central District of California

CV-90-6451-R
HONORABLE MANUEL REAL

PLAINTIFFS-APPELLANTS' MOTION UNDER 28 U.S.C. § 1657 TO SET CASE FOR ORAL ARGUMENT

For the reasons set forth in the accompanying memorandum, plaintiffs-appellants move, in accordance with 28 U.S.C. § 1657, that this and the related appeals (Nos. 92-55677 and 92-55632), which have been consolidated for argument, be scheduled for oral argument as early as practicable.

By: /s/

Henry Paul Monaghan
435 West 116th Street
New York, New York 10027
(212) 854-2644

KAUFMAN MALCHMAN
KAUFMANN & KIRBY
919 Third Avenue
New York, New York 10022
(212) 371-6600

Dated: December 10, 1992

NO. 92-55675

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE EPSTEIN, *et al.*,

Plaintiff-Appellants,

v.

MCA, Inc., *et al.*,

Defendants-Appellees.

On Appeal From the United States
Court For the Central District of California

CV-90-6451-R
HONORABLE MANUEL REAL

DECLARATION OF HENRY P. MONAGHAN IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION FOR EARLY ORAL ARGUMENT

I, HENRY P. MONAGHAN, declare:

I am an attorney duly admitted to practice before this Court. I am co-counsel for the Epstein appellants herein.

Attached to this declaration are a true and correct copy of

(i) the Delaware Chancery Courts' opinion in *In re MCA Inc. Shareholders Litigation*, 598 A.2d 687 (Del. Ch. 1991) (Exhibit A).

(ii) defendants' and Delaware plaintiffs' counsel second settlement agreement, dated October 22, 1992, (Exhibit B).

(iii) the Notice to the Class in the Delaware action, dated October 27, 1992, (Exhibit C).

(iv) an article by John C. Coffee, Jr., entitled *Suspect Settlements in Securities Litigation*, New York Law Journal, March 28, 1991, Page 5, col. 1 (Exhibit D).

I declare that the foregoing is true and correct under the pains and penalties of perjury.

Dated: New York, New York
December 10, 1992

/s/

HENRY P. MONAGHAN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER EPSTEIN, et al.,	)	Nos. 92-55632
Plaintiffs/Appellants,	)	92-55675 92-55677
vs.	)	DC# CV-90-6451-
	)	MLR
MCA, INC., et al.,	)	Central California
Defendants/Appellees.	)	ORDER

Plaintiffs' motion for oral argument and any response thereto shall be referred to the panel that will consider the merits of the appeal.

The plaintiffs' motion to expedite oral argument is denied. This appeal shall be calendared in due course.

The plaintiffs' motion for leave to file a 40-page optional reply brief is denied. The optional reply brief shall be filed by December 24, 1992 and shall consist of no more than 25 pages.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/

Lou Pearson
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A,
General Orders for the United States
Court of Appeals

[File-stamped
December 17, 1992]

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FEDERAL EXPRESS

December 24, 1992

Office of the Clerk
U.S. Court of Appeals
for the Ninth Circuit
121 Spear Street
2nd Floor
San Francisco, California 94105

Re: Epstein *et al.* v. MCA Inc. *et al.*
(Docket Nos. 92-55675

Dear Sir or Madam:

We enclose our reply brief filed in accordance with the extensions of time granted by order of this court. We also enclose a copy of a letter, dated December 2, 1992, that notified opposing counsel of the clerk's granting of our oral application for an extension.

Our motion for permission to file a brief of 40 pages had been denied, as was our motion for early argument. Deputy Clerk Lou Pearson informed us that both orders were entered on her authority alone. She advised us that we could appeal to a judge of the court. She also advised us that, despite her earlier order denying our motion for 40 pages, she could, on her

own authority, grant an additional five pages on the reply brief. We see no reason to appeal at this time the clerk's denial of the motion for early argument. Obviously, we can raise the issue later, as we have observed. We now file our reply brief without the need to request my additional pages.

Sincerely,

/s/ /s/

Henry P. Monaghan
435 West 116th Street
New York, New York 10027
212/854-2644

Roger W. Kirby

Enclosure

cc: All Counsel

SUPREME COURT OF THE UNITED STATES

No. 94-1809

Matsushita Electric Industrial Co., Ltd., et al.

Petitioners

v.

Lawrence Epstein, et al.

ORDER ALLOWING CERTIORARI.

Filed June 19, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted limited to Question 1 presented by the petition.

June 19, 1995

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SEYMOUR LAZAR, et al., Plaintiffs, v. MCA INC., et al., Defendants.	)	Civil Action No. 11740
BARNETT STEPAK, et al., Plaintiffs, v. MCA INC., et al., Defendants.	)	Civil Action No. 11741
SARA NAPHTALI, et al., Plaintiffs, v. MCA INC., et al., Defendants.	)	Civil Action No. 11747

ORDER OF CONSOLIDATION

It appearing that several actions have been filed involving the same subject matter, and that the administration of justice would be best served by consolidating the actions.

IT IS, THIS 2nd day of October, 1990, ORDERED AS FOLLOWS:

1. The above-captioned actions shall be consolidated for all purposes.

2. Hereafter, papers need only be filed in Civil Action No. 11740.

3. The caption of the consolidated action shall be as follows:

IN RE MCA INC. SHAREHOLDERS LITIGATION	CONSOLIDATED Civil Action No. 11740

4. The law firms of ABBEY & ELLIS, 212 East 39th Street, New York, NY 10016; BARRACK, RODOS & BACINE, Suite 1200, 1845 Walnut Street, Philadelphia, PA 19103; BERGER & MONTAGUE, 1622 Locust Street, Philadelphia, PA 19103; GOODKIND, LABATON & RUDOFF, 122 East 42nd Street, New York 10168; GREENFIELD & CHIMICLES, One Haverford Centre, 361 W. Lancaster Avenue, P.O. Box 100, Haverford, PA 19041-0100, KAPLAN & KILSHEIMER, 685 Third Avenue, New York, NY 10017; KAUFMAN, MALCHMAN, KAUFMANN & KIRBY, 919 Third Avenue, New York, NY 10022; KOHN, SAVETT, MARION & GRAF, P.C., 2400 One Reading Center, 1101 Market Street, Philadelphia, PA 19107; LEVIN, FISHBEIN, SEDRAN & BERMAN, 320 Walnut Street, Suite 600, Philadelphia, PA 19106; MILBERG WEISS BERSHAD SPECTHRIE & LERACH, One Pennsylvania Plaza, New York, NY 10119; LAW OFFICES OF I. STEPHEN RABIN, 685 Third Avenue, New York, NY 10017; LAW OFFICES OF ANTHONY RAHMANAN, 11 Pennsylvania Plaza, New York, NY 10001; SCHIFFRIN & CRAIG, 2020 North Halsted Street, Chicago, IL 60614; SIROTA & SIROTA, 747 Third Avenue, 32nd Floor, New York, NY 10017; STULL, STULL & BRODY, 6 East 45th Street, New York, NY 10017; WECHSLER, SKIRNICK, HARWOOD, HALEBIAN & FEFFER, 555 Madison Avenue, 18th Floor, New York, NY 10022; THE LAW OFFICES OF JOSEPH H. WEISS,

319 Fifth Avenue, New York, NY 10016; WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ, 270 Madison Avenue, New York, NY 10016; WOLF POPPER ROSS WOLF & JONES, 845 Third Avenue, New York, NY 10022; and ZWERLING, SCHACHTER & ZWERLING, 800 Third Avenue, New York, NY 10022 are hereby designated as Plaintiffs' Committee of the Whole. The law firms of ABBEY & ELLIS; BERGER & MONTAGUE; MILBERG, WEISS, BERSHAD, SPECTHRIE & LERACH; and WOLF POPPER ROSS WOLF & JONES are hereby designated as Co-Lead Counsel for Plaintiffs. The law firm of MORRIS, ROSENTHAL, MONHAIT & GROSS, P.A., First Federal Plaza, P.O. Box 1070, Wilmington, DE 19899 is hereby designated as Plaintiffs' Liaison Counsel. All pleadings and other papers shall be served upon MORRIS, ROSENTHAL, MONHAIT & GROSS, P.A. and GREENFIELD & CHIMICLES, One Rodney Square, P.O. Box 1035, Wilmington, DE 19899.

5. Plaintiffs' Co-Lead Counsel shall set policy for plaintiffs for prosecution of this litigation, delegate and monitor the work performed by the attorneys for plaintiffs to ensure that there is no duplication of effort or unnecessary expense, coordinate on behalf of plaintiffs the initiation and conduct of discovery proceedings, and provide supervision and coordination of the activities of plaintiffs' counsel.

6. All documents previously filed and served to date in any of the cases consolidated herein are deemed and adopted and are a part of the record in the consolidated action. The Complaint filed in Civil Action No. 11740 is hereby designated as the Complaint in the consolidated action. Defendants need not respond to the Complaints filed in any of the other constituent actions.

/s/

Chancellor

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE:	:	CONSOLIDATED CIVIL
MCA INC. SHAREHOLDERS LITIGATION	:	ACTION NO. 11740

AMENDED STOCKHOLDERS' CLASS ACTION COMPLAINT

Plaintiffs allege upon information and belief, except for paragraph 5 which is alleged upon knowledge, as follows:

NATURE OF THE ACTION

1. This is a stockholders' class action on behalf of the public stockholders of MCA Inc. ("MCA" or the "Company") who are being deprived of the opportunity to maximize the value of their MCA common stock in the sale of the Company. This Amended Stockholders' Class Action Complaint (the "Amended Complaint") is being filed pursuant to the Stipulation and Order governing scheduling in this action. The Amended Complaint incorporates plaintiffs' allegations against defendants as set forth in a letter dated December 4, 1990, from Steven Schulman, Esquire, to Herbert M. Wachtell, Esquire.

2. As more fully described herein, on November 26, 1990, defendants Lew R. Wasserman ("Wasserman") and Sidney Jay Sheinberg ("Sheinberg"), together with other members of MCA senior management and their advisors, entered into a merger agreement which provides for the sale of MCA to Matsushita Electric Industrial Co. ("Matsushita"), a Japanese corporation and one of the world's largest consumer electronic manufacturers (the "Merger"). As part of the

Merger, Matsushita commenced a tender offer to MCA's stockholders on November 30, 1990, for all of MCA's common stock at a price of $66 per share plus a purportedly pro rata distribution of the stock of one of MCA's businesses, WWOR-TV (the "Tender Offer"). The Tender Offer expires by its terms on December 29, 1990.

3. The decision by defendants to sell the Company imposes upon them fundamental fiduciary duties to disclose all material facts to the Company's stockholders with complete candor and to seek the best possible transaction for the stockholders through implementation of bidding mechanisms or the exploration of strategic alternatives designed to assure the maximization of stockholder value. MCA's board of directors (named as defendants in this action) have been and are breaching their fiduciary duties to the stockholders of MCA by, *inter alia*, (1) failing adequately to disclose to MCA's stockholders material facts necessary to make an informed decision about the Tender Offer and Merger, including substantial conflicts of interest involving defendants Wasserman and other MCA senior management and MCA's Board of Directors, the future status of WWOR-TV, prior market contacts from other potential purchasers of MCA, and other material information, (2) giving preferential treatment to defendant Wasserman by paying him preferred stock rather than the consideration paid to the public stockholders, and (3) negotiating and entering the Merger agreement on a preferential basis with Matsushita and failing to implement the auction or other bidding mechanisms or market check procedures necessary to assure that the stockholders receive the highest possible price in connection with the change in control.

4. The Merger is designed by the Individual Defendants and other members of MCA senior management to entrench the officers and directors of MCA in the management and control of MCA and to advance their own personal interests at the expense of MCA's public stockholders. Indeed, the Merger represents the culmination of a series of steps which the Individual Defendants have taken to deter and ultimately thwart any unsolicited expression of interest to acquire the Company which they have not initiated or approved. In

furtherance of these efforts, the Individual Defendants over the last several years have adopted and utilized an array of defensive weapons, including (a) a "poison pill" created for the purpose of discouraging unsolicited takeover attempts and usurping from MCA's stockholders the power to accept or reject any proposal for the purchase of their shares; (b) lucrative severance agreements (or "golden parachutes") to several executive officers of the Company; and (c) a "staggered" board intended to deter any unsolicited acquisition efforts.

5. The Individual Defendants and other members of MCA senior management with whom they are allied are attempting to transfer the entire ownership and control of the Company's outstanding shares at a price substantially below their fair and intrinsic value, in order to gain valuable personal benefits from Matsushita in the Merger. As shown herein, the Merger and Tender Offer are timed to take advantage of a recent serious decline in the market value of MCA's common stock resulting from a temporary and reversible decline in revenues and net income caused *inter alia*, by the Company's expansion plan and a temporary market decline due to world events, including the Persian Gulf crisis. The long-term benefits which will result from this plan vastly exceed the immediate costs and burdens involved in developing these business opportunities and demonstrate that Matsushita in conjunction with the Individual Defendants is attempting to appropriate for itself the future growth and profitability of this entertainment giant without providing adequate disclosure of material information and obtaining fair and adequate consideration for the MCA public stockholders.

6. Preliminary and permanent injunctive relief and other equitable remedies are necessary to protect MCA public stockholders from the immediately threatened divestiture of their equity interest in MCA under circumstances representing a gross deviation from the enhanced fiduciary responsibilities which Delaware law imposes in connection with the sale of a company or any other fundamental change in corporate control.

THE PARTIES

7. Plaintiffs are owners of shares of common stock of MCA who have been damaged and are threatened with further injury by the wrongful actions of the defendants as set forth below. They bring this action as a class action on behalf of the public stockholders of MCA.

8. Defendant MCA is a Delaware corporation that maintains its principal executive offices in Universal City, California. MCA is an international concern engaged in the production and distribution of theatrical, non-theatrical, television and home video products; licensing of merchandising rights and film property publishing rights; manufacture and distribution of recorded music and music publishing; operation of amphitheaters; manufacturing and licensing of entertainment/sports apparel, non-consumable concessions for sports/entertainment events and other music entertainment activities; retailing and mail order of gift merchandise; book publishing; television broadcasting; recreation services; and real estate development.

9. At all relevant times herein, each of the following defendants (collectively, the "Individual Defendants") were directors of MCA and/or senior officers of MCA.

a. Lew R. Wasserman is Chairman of the Board, Chief Executive Officer and a member of the Executive Committee. Wasserman's current annual salary is approximately $900,000. Wasserman also owned as of January 31, 1990 over 4.9 million shares of MCA common stock representing approximately 6.7% of the common shares outstanding. In connection with the Merger, Wasserman will receive an enhanced salary of at least $3 million annually, as well as preferred stock in Holding that will pay him a cash dividend exceeding $28 million annually.

b. Sidney Jay Sheinberg ("Sheinberg") is a Director, President and Chief Operating Officer and a member of the Executive Committee. Sheinberg's current annual salary is approximately $900,000. Sheinberg also owned as of January 31, 1990, approximately 1.3 million shares of MCA common

stock, representing approximately 1.8% of the common shares outstanding. In connection with the Merger, Sheinberg will receive an enhanced salary of over $8 million annually, plus a cash bonus of $21 million.

c. Thomas P. Pollock ("Pollock") is a Director and Executive Vice President. Pollock's current annual salary is $850,000. Pollock also owned as of January 31, 1990, 144,240 shares of MCA common stock, representing approximately .02% of the amount of common shares outstanding. As part of the Merger, Pollock will receive $16.7 million in bonuses and incentives.

d. Thomas Wertheimer ("Wertheimer") is a Director, Executive Vice President and a member of the Executive Committee. Wertheimer's current annual salary is $650,000. Wertheimer also owned as of January 31, 1990, 227,235 shares of MCA common stock, representing approximately .03% of the amount of common shares outstanding. In connection with the Merger, Wertheimer will receive $7.7 million in bonuses and incentives.

e. Charles S. Paul ("Paul") is a Director and President of MCA Enterprises, a subsidiary of MCA. In connection with the Merger, Paul will receive $12.3 million in bonuses and incentives.

f. Howard H. Baker ("Baker"), a Director, is a Partner in the law firm of Baker, Worthington, Crossley, Stansberry & Woolf. Baker's firm will receive substantial compensation from MCA for services purportedly rendered in the Tender Offer and Merger.

g. Robert S. Strauss, a Director, is a Partner in the law firm of Akin, Gump, Strauss, Hauer & Feld. Strauss' firm represented both MCA and Matsushita in connection with the Tender Offer and Merger. His firm will receive $8 million from MCA for its services purportedly rendered in connection with the challenged transaction, and on undisclosed sum for its representation of Matsushita.

h. Felix G. Rohatyn, a Director, is a General Partner of Lazard Freres & Co. ("Lazard") which served as the principal financial advisor to MCA, and delivered a "fairness opinion" in connection with the Tender Offer and Merger, for which Lazard will receive over $16.8 million in the event that a sale of the Company is accomplished.

i. Defendants Thomas V. Jones, Howard P. Allen, and Mary Gardiner Jones are each members of MCA's Board of Directors. These directors receive annual directors' compensation of $18,000, plus $18,000 per year for each committee on which they serve, and $1,500 for each directors' and committee meeting they attend.

10. Defendant Matsushita, a company organized under the laws of Japan, is one of the world's largest producers of consumer electronic and electric products with sales in fiscal 1990 of more than $37 billion. Matsushita operates 117 companies in 39 countries. Matsushita's principal executive offices are located in Osaka, Japan. Defendants Matsushita Acquisition Corp. ("Acquisition"), a Delaware corporation and a wholly-owned subsidiary of defendant Matsushita Holding Corp. ("Holding"), also a Delaware corporation, has been incorporated for the purpose of purchasing all the common stock of MCA. Under Section 6.17 of the Merger Agreement, defendants Matsushita, Acquisition and Holding submit to the personal jurisdiction of this Court.

11. All officers and directors of MCA, as a group, including the Individual Defendants, beneficially owned over 7 million shares of MCA common stock, or nearly 10% of MCA's common stock outstanding as of January 31, 1990.

12. By virtue of their positions as directors and/or officers of MCA and their exercise of control over the business and corporate affairs of MCA, the Individual Defendants have and at all relevant times had the power to control and influence, and did control and influence and cause MCA to engage in the practices complained of herein. Each Individual Defendant owed and owes MCA and its stockholders fiduciary obligations and were and are required to: fulfil their duty of

candor to the stockholders by making timely and adequate disclosures in press releases and in the materials filed with the Securities Exchange Commission ("S.E.C.") in connection with the Tender Offer and Merger, including Schedules 14D-1 and 14D-9; use their ability to control and manage MCA in a fair, just and equitable manner; act in furtherance of the best interests of MCA and its stockholders; act to maximize stockholder value; govern MCA in such a manner as to heed the expressed views of its public shareholders; refrain from abusing their positions of control; and not to favor their own interests at the expense of MCA and its stockholders. MCA has distributed the Offer to Purchase to its stockholders together with the Schedule 14D-9 and Matsushita has the right to "review and comment" upon disclosure materials of MCA in connection with the Tender Offer and Merger. Therefore, all defendants are jointly responsible for the inadequate disclosures provided to MCA stockholders in connection with the challenged transactions.

13. By virtue of the acts and conduct alleged herein, the Individual Defendants, who control the actions of the Company, are breaching their fiduciary duties to the public stockholders of MCA.

14. The Individual Defendants are sued individually as conspirators and aiders and abettors, as well as in their capacity as officers and/or directors of the Company, and the liability of each arises from the fact that they have engaged in all or part of the unlawful acts, plans, schemes or transactions complained of herein.

15. Matsushita, Acquisition and Holding are acting in concert with the Individual Defendants and are sued as conspirators and aiders and abettors of the Individual Defendants.

CLASS ACTION ALLEGATIONS

16. Plaintiffs bring this action pursuant to Rule 23 of the Rules of the Court of Chancery on behalf of themselves and all other stockholders of MCA, or their successors in interest (the "Class"). Excluded from the Class are the defendants, members of the immediate families of the Individual

Defendants or their representatives, and directors, officers, subsidiaries, controlled affiliates, and partners of any of the defendants.

17. The action is properly maintainable as a class action for the following reasons:

a. The Class is so numerous that joinder of all members is impracticable. As of January 31, 1990, MCA had in excess of 73,000,000 shares of common stock outstanding held by thousands of stockholders of record and beneficial owners;

b. The members of the Class are scattered throughout the United States and are so numerous as to make it impractical to bring all of them before this Court;

c. There are questions of law and fact which are common to the Class and which predominate over questions affecting only individual Class members. The common questions include, *inter alia*, the following:

i) whether the Individual Defendants have breached their fiduciary obligations to plaintiffs and the other members of the Class by failing and refusing to attempt in good faith to maximize stockholder value in the sale of the Company;

ii) whether the Individual Defendants have breached the fiduciary and other common law duties including the duty of complete candor owed by them to plaintiffs and the other members of the Class; and

iii) whether defendants have subjected MCA to potential liability under S.E.C. Rules 14d-7, 14d-10, 10b-13 and 13e-3, promulgated under the Securities and Exchange Act of 1934 (the "Exchange Act"), thereby causing MCA to expend and waste corporate assets that could have been distributed for the benefit of MCA's public stockholders; and

iv) whether plaintiffs and the other members of the Class are being or will continue to be injured by the wrongful conduct alleged herein and, if so, what is the proper remedy and/or measure of damages.

18. Plaintiffs are committed to prosecuting this action and have retained competent counsel experienced in litigation of this nature. The claims of plaintiffs are typical of the claims of other members of the Class and plaintiffs have the same interests as the other Class members.

19. A class action is superior to other available methods for the fair and efficient adjudication of this action, and no unusual difficulties are likely to be encountered in the management of this class action. The likelihood of individual Class members prosecuting separate claims is remote.

20. Defendants have acted and are about to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the Class as a whole.

BACKGROUND

21. MCA is a recognized leader in the entertainment industry operating in six major business segments: film entertainment (51% of 1989 revenues of $3.4 billion); music entertainment (23%); retail and mail order (8%); book publishing (6%); broadcasting and cable (5%); and other operations (7%). MCA has had outstanding financial results in recent years as evidenced by the growth in sales and earnings as summarized below:

MCA Five Year Summary
(all figures in thousands except growth rate and EPS)

Year	***Sales***	***Net Income***	***EPS(S)***
1989	3,382,344	191,773	2.62
1988	2,900,339	164,916	2.26
1987	2,479,105	137,254	1.82
1986	2,230,018	150,904	1.97
1985	2,021,078	149,959	2.02
5-Year Growth Rate (%)	13.70	6.30	6.70

22. In June 1989, the Company opened its new Universal Florida theme park which will operate in direct competition with the Disney World facility in Orlando, Florida. MCA also scored a recent coup when it paid the equivalent of $550 million in preferred stock for Geffen Records, a leading member of the recording industry. It also owns WWOR-TV, an independent New York area television station, and has a 50% stake in the cable USA Network.

23. On July 19, 1990, defendant Wasserman announced that for both the three and six months ended June 30, 1990, the Company reported record second quarter and first half revenues and higher net income than the comparable periods of 1989. Revenues for the second quarter of 1990 were $949,942,000 compared to $828,256,000 for 1989. Net income was $44,781,000 or $0.54 per share compared to $41,972,000 or $0.58 per share for 1989. The weighted average number of common and common equivalent shares used in the determination of earnings per share for the three months ended June 30, 1990 and 1989 was 83,245,493 and 73,142,872, respectively. The 1990 calculations of earnings per share include the equivalent common shares for the Company's Series B convertible preferred shares issued during the second quarter of 1990 in connection with the Geffen acquisition.

24. Similarly, revenues for the first half of 1990 were $1,862,888 compared to $1,531,602 for 1989. New income was $76,359,000 or $0.96 per share compared to $69,313,000 or $0.95 per share for 1989.

25. MCA's film entertainment group reported record revenues and operating incomes in the second quarter of 1990. The music entertainment group also reported record revenues and operating income for the second quarter of 1990. Broadcasting and cable reported record revenues and operating incomes in the second quarter of 1990 due to improved results for WWOR-TV and the USA Network. Retail and mail order had higher revenues in 1990 due to higher retail store sales.

26. The fiscal 1989 financial statements show that MCA's financial condition is also strong. The current ratio (current assets: current liabilities) was above 2X as it had been during the two years previous while the Company's debt/equity ratio decreased from 0.79 to an even more conservative 0.65.

27. Recognizing the strength of MCA's assets and the quality of its operations, industry financial analysts have conservatively valued MCA at up to $100 per share. However, MCA, like other media and entertainment companies, has recently suffered a serious decline on Wall Street. Since July, 1990, the market value of the stock has declined from a high of approximately $64 per share to as low as $34 per share immediately prior to the announcement of a prospective transaction with Matsushita. The decline in the value of the stock was accelerated by reports concerning problems incident to the opening of the vast new theme park in Orlando, Florida, the perceived dilution caused by the issuance of substantial additional shares to the Geffen interests in connection with the Geffen acquisition, and the overall market decline attributed to the Persian Gulf crisis. These factors are temporary and reversible and do not detract from the impressive long-term strengths of the Company.

28. On September 25, 1990, the *Wall Street Journal* reported that Matsushita was negotiating with MCA over an acquisition transaction involving the entertainment giant. Both MCA and Matsushita thereafter publicly confirmed that representatives of the respective companies were involved in negotiations regarding a prospective change in control transaction. According to published reports, the widespread perception among major stock traders and financial analysts was that an announcement of a sale transaction was imminent. Reflecting these expectations, the market price of MCA common stock surged dramatically upward immediately upon announcement of these events from $34 1/2 per share to close at $54 per share on September 25, 1990, a net increase of 57%.

29. On September 26, 1990, plaintiffs filed their original Shareholders' Class Action Complaint (the "Original

Complaint"). The Original Complaint sought injunctive and declaratory relief, as well as money damages, against an improper transaction between MCA and Matsushita.

30. On November 26, 1990, MCA entered into an Agreement of Merger with Matsushita. Under the Merger Agreement, Acquisition on November 30, 1990 commenced the Tender Offer to purchase all of MCA's common stock at a price of $66.00 per share in cash. On the same day, defendants filed Schedules 14D-1 and 14D-9 with the S.E.C. and distributed to MCA's stockholders the Offer to Purchase. The Tender Offer expires on December 29, 1990. The Merger Agreement also calls for MCA to spin off to its stockholders, on a purportedly pro rata basis, its interest in the television station WWOR-TV.

31. In addition, the principals to the transaction have negotiated and entered into a series of other transactions and agreements, including the following:

a. The Option Agreement, which provides for MCA to grant to Matsushita an irrevocable option to purchase 16,880,788 shares of MCA stock at a price of $71 per share in the event that (1) a third party commences a tender offer for 50% or more of MCA's stock, (2) a third party acquires 33% or more of MCA's stock, or (3) the MCA Board withdraws or modifies its recommendation or approval of the Merger;

b. The Capital Contribution Agreement, which provides for defendant Wasserman to contribute 4,953,927 shares of MCA stock to Holding in exchange for Holding preferred stock. Under this agreement, Wasserman, unlike the public stockholders of MCA, will receive consideration for his MCA stock in a tax-free transaction;

c. The Tender Agreements, which provide for defendants Sheinberg and Geffen to tender their MCA stock into the Tender Offer; and

d. The Distribution Agreement, which provides for MCA to spin off WWOR-TV to its stockholders. The Distribution Agreement also calls for WWOR-TV to adopt a

"share purchase rights plan," or poison pill, acceptable to defendants following the Merger.

32. As detailed in paragraph 9, above, the Merger also provides for substantial payments and other benefits for certain of the Individual Defendants that will not be shared by MCA's public stockholders. For example, defendant Sheinberg will receive a $21 million cash bonus, plus a reported $9.6 million in "incentive awards." Sheinberg also will receive an enhanced salary of $8.6 million per year under the Merger Agreement, up from approximately $900,000 under his prior contract with MCA. Defendant Wasserman will receive an enhanced salary of at least $3 million per year under the Merger Agreement, up from less than $900,000 under his prior contract with MCA.

33. Additionally, defendant Wasserman, unlike the public stockholders of MCA, also will receive new preferred stock in Holding in order to reap the substantial, additional benefits of a tax-free transaction. MCA's public stockholders do not have the opportunity to participate in any such tax-free exchange. Defendant Wasserman's Holding preferred stock will pay a dividend of $28.6 million per year, up from the over $3 million he currently receives annually. Finally, other senior officers of MCA will receive "bonuses" and "incentives" totalling almost $55 million in the Merger, as described above in paragraph 9.

34. The Tender Offer and Merger are timed to take advantage of a temporary downturn in the price of MCA common stock. MCA's stock price has recently declined primarily due to the initial problems experienced in opening the Florida theme park, the dilutive impact of the Geffen acquisition, and temporary world economic conditions. Shortly prior to announcement of the Merger discussions in September, 1990, MCA stock traded at approximately $34 to $35 per share. However, in 1989, the stock traded at prices considerably above the $66 Tender Offer price. The Tender Offer and Merger will occur at a time when the Company is poised to enjoy significantly increased earnings in the future, as the

operations of the Florida theme park are stabilized and the beneficial impact of the Geffen acquisition is realized.

35. The intrinsic value of the Company materially exceeds the $66.00 per share and WWOR-TV stock value which Matsushita will pay in the Tender Offer. Given the Company's potential growth and profitability, the underlying strength of its assets, growth plans, resources and accessibility to public and private financing, the price to be paid to the public stockholders is unfair and inadequate.

DEFENDANTS' BREACHES OF THEIR DUTY OF CANDOR

36. Defendants have breached and continue to breach their duties of candor to MCA's public stockholders by failing to disclose adequately material information concerning the Tender Offer and Merger. Under Section 4.06 of the Merger Agreement, MCA has the opportunity to review and comment upon Matsushita's Offer to Purchase and Schedule 14D-1. Moreover, all defendants acted in concert with and/or aided and abetted one another in filing and disseminating Matsushita's Offer to Purchase, Schedule 14D-1 and Schedule 14D-9. Finally, MCA's 14D-9 disseminated the Offer to Purchase as an exhibit thereto. Therefore, all defendants are responsible jointly for the inadequate and misleading disclosures provided to MCA's stockholders in connection with the Tender Offer and Merger.

37. Defendants have breached their duties of candor to MCA's public stockholders by failing to disclose adequately the nature and circumstances of the substantial benefits that the Individual Defendants will receive in the Merger. The Offer to Purchase and Schedules 14D-1 and 14D-9 give the misleading impression that Sheinberg's, Wasserman's and certain of the other Individual Defendants' lucrative employment and bonus agreements, as described above in paragraph 9, were imposed "as a condition to Matsushita's willingness to agree to enter the Merger Agreement. . . ." and are not substantially greater than they would be if not for the Merger (*See* Offer to Purchase; Schedule 14D-9 at 23-26). In fact,

Sheinberg's, Wasserman's and the other Individual Defendants' personal benefits from the Merger were insisted upon by MCA management as the price of its willingness to negotiate with Matsushita and are far greater than the Individual Defendants could have expected to receive in the ordinary course. Matsushita willingly agreed to pay, and encouraged the payment of, such compensation because of its expectation that this would vastly limit the independence of senior management and the MCA Board in negotiating with Matsushita and thereby save the purchaser potentially hundreds of millions or billions of dollars in acquisition costs that a fully disinterested MCA Board would have insisted upon. The portrayal of the management benefits as consistent with ordinary practice and as proceeding from the wishes of the purchaser to secure the services of the present MCA officers and directors is materially false and deceptive and calculated to present a neutral or positive impression of special arrangements, which create serious conflicts of interest that the defendants have attempted to conceal.

38. Defendants also have breached their duties of candor by failing adequately to disclose their intention to retain *de facto* control over WWOR-TV following the spinoff of that entity to MCA's stockholders in the Merger. The Offer to Purchase and Schedules 14D-1 and 14D-9 falsely suggests that WWOR-TV could be put up for sale on the basis of competitive bidding following the Merger. In fact, the provision in the Merger for a board of directors following the spinoff that will be dominated by MCA management and the planned implementation of a shareholder rights plan, or "poison pill" have both the purpose and effect of entrenching in the control of WWOR-TV the MCA designees, and preventing a sale of the television station on the basis of effective and competitive bidding.

39. Additionally, defendants have breached their duty of candor to MCA's public stockholders by failing adequately to disclose significant and material information about the various operating segments of MCA that has been concealed from the public stockholders but provided exclusively to Matsushita. The Schedule 14D-9 creates the false impression that

such information would not be "material" to MCA's stockholders. In fact, such concealed information would be of significance to MCA stockholders who must make an informed election between exchanging their shares in the Tender Offer or Merger and a statutory appraisal proceeding. Defendants' failure to disclose both the material nature of this information and the information itself constitute breaches of defendants' duty of candor.

40. Defendants also have breached their duty of candor by failing to disclose prior market contacts between MCA and other potential purchasers which would indicate to MCA's stockholders the level of market interest MCA could attract in an open and effective auction. The Offer to Purchase and Schedules 14D-1 and 14D-9 falsely indicate that "no party other than Matsushita had made or expressed any interest in making a proposal to acquire the Company . . . ." (*See*, e.g., Schedule 14D-9 at 40). Defendants have failed to disclose that interested purchasers were rebuffed by defendants when such potential purchaser refused to grant the Individual Defendants the generous personal benefits granted by Matsushita. Such information would materially assist MCA's stockholders in assessing the fairness and adequacy of the Tender Offer and Merger.

41. Finally, defendant Wasserman's equity participation in Holdings following the Merger demonstrates that the parties are engaged in a form of "going private" transaction subject to the disclosure requirements of S.E.C. Rule 13e-3, promulgated under the Exchange Act. However, defendants have not made the required filings with the S.E.C. which would be required to be made were they proceeding in accordance with Rule 13e-3. In particular, the Lazard investment banker's "book" has not been made publicly available as would otherwise be the case were the parties proceeding in accordance with the requirements of Rule 13e-3. Material information regarding the fairness and adequacy of the proposed transaction has thus been withheld from the investing public. Delaware fiduciary duties of complete candor incorporate the requirement to make available in a "going private" transaction the materials required by Rule 13e-3.

DEFENDANTS' BREACHES OF THEIR FIDUCIARY DUTIES TO MAXIMIZE STOCKHOLDER VALUES AND ACT IN THE BEST INTERESTS OF THE STOCKHOLDERS

42. Defendants owe fundamental fiduciary obligations of complete candor to the Company's stockholders in connection with the Tender Offer and Merger. Defendants also owe fundamental fiduciary obligations to the Company's stockholders to take all necessary and appropriate steps to maximize the value of their shares in implementing such a transaction. In addition, the Individual Defendants have the responsibility to act independently so that the interests of MCA's public stockholders will be protected, and to conduct fair and active bidding procedures or other mechanisms for checking the market to assure that the highest possible price is achieved. Further, the directors of the Company must adequately insure that no conflict of interest exists between defendants' own interests and their fiduciary obligations to maximize stockholder value or, if such conflicts exists, to insure that all such conflicts will be resolved in the best interest of the Company's public stockholders.

43. In breach of their fiduciary duty, a majority of the MCA Board of Directors have financial or other conflicting interests in the success of the transaction. Senior management are eligible to receive bonus and compensation payments immensely greater than they would otherwise receive under their present contracts. Mr. Wasserman has negotiated a very favorable agreement in connection with the Merger which will insulate him from costly taxes. Defendant Baker faces a significant conflict of interest because of substantial payments made to his law firm in connection with the Merger. Defendant Strauss similarly faces a substantial conflict of interest because of the dual representation by his law firm of Matsushita and MCA and in fact participated in the deliberations of the Board regarding the Tender Offer and Merger, although abstaining from voting on the Merger. Defendant Rohatyn cannot claim any objectivity with respect to his support for the Merger because of the multi-million dollar fees which Lazard -- the principal financial advisor in the Merger and a

firm in which Rohatyn is a General Partner -- will receive in the event that the Merger is consummated. In addition, Lazard's "fairness" opinion is unreliable because of the agreement which Lazard has arranged, by which Lazard receives multi-million dollar advisory fees contingent upon the completion of the acquisition transaction.

44. MCA represents a highly attractive acquisition candidate which has drawn the interest of such international business enterprises as General Electric Co., and Capital Cities/ABC Inc., both of which were reportedly willing to pay in excess of $90 per share in an acquisition transaction. Additionally, MGM/Pathe Communications Corp. appears to have been rebuffed in its efforts to negotiate a higher offer with defendants. The preferential treatment accorded Matsushita by the Individual Defendants for their own gain has deprived and will continue to deprive the MCA public stockholders of the very substantial premiums which proper exposure of the Company to the market could have provided.

45. The Individual Defendants have breached their fiduciary and other common law duties owed to plaintiffs and the other members of the Class in that they have not and are not exercising independent business judgment and have acted and are acting to the detriment of the Class in order to benefit themselves and other members of MCA senior management acting in concert with Matsushita.

46. As reported in the September 25, 1990 *Wall Street Journal* article prior to the merger agreement, "any transaction would have to have the blessing of Wasserman," MCA's Chairman of the Board. Defendant Wasserman, who is 77 years old, owns almost 7% of the outstanding common shares of the Company. In addition, the *Wall Street Journal* article reported that Matsushita "wants to keep MCA management in place" in conjunction with an acquisition transaction. More importantly, the lucrative salary, bonus and "incentive" agreements between Matsushita and the Individual Defendants as well as the preferential treatment accorded defendant Wasserman have deprived the Individual Defendants of their ability to judge independently and fairly the value of MCA.

As a result, the Merger is not the product of arm's length negotiations and is not based upon any independent evaluation of the current value of MCA's common stock, assets or business. Rather, the Merger and Tender Offer price is being fixed arbitrarily by Matsushita in conjunction with MCA senior management as part of their unlawful plan and scheme to obtain the entire ownership of the Company's assets and business at an unfair and inadequate price.

47. Contrary to normal and established procedures in implementing such transactions, defendants have apparently failed to created any "Special Committee" of fully independent and disinterested directors who will act objectively and in the sole and ultimate best interests of all stockholders in effectuating the sale of the Company.

48. Under the terms of the Capital Contribution Agreement, defendant Wasserman will receive preferred stock in a subsidiary of Matsushita in exchange for his holdings of MCA shares. The purpose of this agreement is to afford defendant Wasserman tax-free treatment not available to other shareholders, and to save Wasserman millions of dollars in taxes that would be due if he received cash. By providing defendant Wasserman with this preferential treatment in the acquisition, and by assuring that Wasserman received greater value per share than that available to other MCA shareholders, the Individual Defendants have breached their duty of loyalty to MCA and its stockholders and all defendants have effected illegal and impermissible discrimination among MCA's stockholders and the shares they hold.

49. The Individual Defendants have also failed to engage in a sufficient "market check" necessary to assure the fairness and adequacy of the Tender Offer and Merger terms. Since the commencement of discussions and negotiations with Matsushita in or about September 1990, MCA has been prevented from soliciting any competitive expressions of interest or purchase proposals. In addition, the parties have clearly rejected any post-agreement "market check" by virtue of their refusal to extend the Tender Offer beyond the minimum required under federal regulations, by their adoption of the Option

Agreement which provides Matsushita with a "lock-up" option, and by agreeing to break-up fees amounting to $125 million, among other restraints that prevent any genuine auction from developing. MCA remains prohibited from soliciting competitive expressions of interest and, while MCA may respond to any competitive proposals which are made, the limited time available and obvious allegiances of management and the Board of Directors inevitably will discourage genuine competitive bids from emerging.

50. Certain other aspects of the transaction confirm the fundamental failure of the MCA directors to obtain the best possible transaction unaffected by conflicts of interest. In order to facilitate the transaction with Matsushita, defendants have arranged to spinoff the WWOR-TV subsidiary to stockholders rather than investing the additional time and effort necessary to auction this subsidiary at the highest possible price and thereby generate maximum proceeds for the shareholders. In addition, the Distribution Agreement contemplates that the spun off company will adopt a "poison pill" in form acceptable to Matsushita and MCA. If this subsidiary were genuinely to the independent, it would be unnecessary to incorporate such provision in the agreements. The implementation of the poison pill under these circumstances is intended to present the emergence of an open and effective auction for the television station and to assure that those persons chosen by the principals to manage the station will confront no challenge to their control.

51. Moreover, the MCA directors have agreed to an arrangement whereby the Yosemite subsidiary will be marketed at some later time and its earnings prior to sale will be placed in escrow for the benefit of the National Park Service. The escrowing of the Yosemite profits for an indeterminate period is clearly calculated to assuage public sentiment concerning the transaction and allow the defendants to achieve their personal agenda in consummating the sale under the agreed terms. A sale to another purchaser may not engender such public sensitivities and under those circumstances, the value of the Yosemite subsidiary would unquestionably be reserved for the shareholders.

52. Defendants also have failed or refused to take those steps necessary to ensure that the Company's stockholders will receive maximum value for their shares of MCA stock. Defendants failed to announce any active auction or open bidding procedures best calculated to maximize stockholder value in selling the Company.

53. In addition, despite the possible interest of several companies in acquiring MCA, defendants favor an acquisition of the Company by Matsushita which expressed a firm desire to maintain the Individual Defendants and other members of MCA senior management (with whom they are allied) in their positions of control subsequent to the consummation of the Merger. As a result, the Individual Defendants are acting to entrench themselves in their offices and positions and to receive enhanced and substantial salaries and perquisites, all at the expense and to the detriment of the Company's public stockholders.

54. The Individual Defendants were induced to sell MCA to Matsushita for a grossly inadequate price by Matsushita's payment of the above described substantial payments and benefits to the Individual Defendants, at a time when MCA's common stock was temporarily under-rated as a result of, *inter alia*, the Company's expansion plan and a temporary decline of the stock market due to world events. As a result, the Individual Defendants are faced with substantial conflicts of interest between the best interests of MCA's stockholders and their own financial gains and continued employment.

55. By the acts, transactions and courses of conduct alleged herein, the Individual Defendants, other than MCA, individually and as part of a common plan and scheme in breach of their fiduciary duties and obligations, have and will unfairly deprive plaintiffs and the other members of the Class of their investment in MCA and to ensure continuance of their positions as directors and officers and enhanced compensation, all to the detriment of the Company and its stockholders. The Individual Defendants have been engaged in a wrongful effort to entrench themselves in their offices and positions of

control and prevent the acquisition of the Company except on terms which would further their own personal interests.

56. These events represent the culmination of an entire plan and scheme by which the Individual Defendants have sought to isolate themselves from any acquisition of the Company except under circumstances directly serving their personal interests at the expense of MCA's public stockholders. Previously, in July 1987, MCA implemented a stockholder rights plan (or "Poison Pill") designed to deter unsolicited takeover bids by making any hostile takeover attempt prohibitively expensive. The Poison Pill was subsequently modified on March 1, 1988 and December 6, 1988, to lower the trigger points at which the plan is activated and otherwise intensify its deterrent impact, thus magnifying the Individual Defendants' power to resist unwanted third party offers.

57. The Individual Defendants have also caused or taken advantage of other entrenchment devices designed to repel any takeover effort not endorsed by them. Among other things, MCA's certificate of incorporation provided for a staggered Board of Directors. Further, the Company entered into lucrative severance agreements ("Golden Parachutes") with five executive officers of MCA, including defendants Wasserman and Sheinberg. The Golden Parachutes provided for cash payments of million of dollars triggered by, among other things, any change in control of the Company. These Golden Parachutes were designed to make an unfriendly acquisition of the Company economically disadvantageous.

58. In addition, defendant Wasserman exercised voting and investment power as to approximately 6 million MCA shares in addition to the approximately 5 million shares which he personally owned. These additional shares were held in a series of trusts and charitable associations over which Wasserman served as a trustee or otherwise exercised control. Aggregating the shares owned directly by Wasserman with those over which he exercised voting and investment powers as a trustee or in similar capacities, the MCA directors and officers as a group beneficially owned in excess of 13 million MCA

shares, constituting approximately 18% of the outstanding common stock. Such aggregate ownership and control reposed in senior management was deliberately structured to frustrate an unwanted bidders' ability to meet the requirements of the Delaware Anti-Takeover Statute.

59. In this regard, in order to meet the requirements of the Delaware Anti-Takeover Statute, 8 Del.C. §203 (the "Delaware Act" or the "Act") for the prompt completion of a second-step "business combination", Section 203(a) requires that (i) prior to purchasing 15 percent or more of MCA common stock, any potential acquiror of the Company obtain approval from the MCA Board of Directors of the proposed "business combination;" (ii) a third party acquire in a single transaction a sufficient number of shares of MCA common stock to go from an ownership position of under 15% to one of over 85% (the "85% Exception"); and (iii) after obtaining 15%, the potential acquiror obtain the approval of the MCA Board and 66-2/3% of the other stockholders to the subsequent "business combination."

60. The ownership and control of MCA stock by the Individual Defendants and senior management therefore effectively placed under their control in excess of 15% of the Company's common stock, thereby preventing a hostile bidder from satisfying the 85% Exception. This had the intended and inevitable effect of frustrating an unsolicited bidders' efforts to acquire the Company and predictably shifts corporate power to the hands of entrenched management.

61. By virtue of the acts and conduct alleged herein, the Individual Defendants, who control the actions of the Company, have carried out a preconceived plan and scheme to place their own personal interest ahead of the interests of MCA's public stockholders and thereby entrench themselves in their offices and positions within the Company. The Individual Defendants have violated their fiduciary duties owed to plaintiffs and the Class, including their fiduciary duties of complete candor, in that they have not and are not exercising independent business judgment and have acted and are acting

to the detriment of MCA's public stockholders for their own personal benefit.

62. The Individual Defendants have breached their fiduciary duties by reason of the acts and transactions complained of herein, including their decision to effect the Merger with Matsushita without making any effort to obtain the best offer possible, by affirmatively attempting to prevent a better offer, and by failing to disclose material facts to MCA's stockholders.

63. As a result of the actions of the Individual Defendants, plaintiffs and the other members of the Class have been and will be damaged in that they have not and will not receive their fair proportion of the value of MCA's assets and business and/or have been and will be prevented from obtaining a fair and adequate price for their shares of MCA's common stock.

64. Defendants have subjected MCA to potential liability under the federal securities laws, thus causing MCA to expend and waste corporate assets that could otherwise be utilized for the benefit of MCA's public stockholders.

65. Plaintiffs seek preliminary and permanent injunctive relief and declaratory relief preventing defendants from inequitably and unlawfully depriving plaintiffs and the Class of their right to realize a full and fair value for their stock at a substantial premium over the market price, and to compel defendants to carry out their fiduciary duties of candor and to maximize shareholder value in selling MCA.

66. Plaintiffs and the Class have no adequate remedy at law. Only through the exercise of this Court's equitable powers can plaintiffs be fully protected from the immediate and irreparable injury which defendants' actions threaten to inflict.

67. Unless enjoined by the Court, defendants will continue to breach their fiduciary duties owed to plaintiffs and the other members of the Class, and/or aid and abet and participate in such breaches of duty, and will consummate the

Tender Offer and the Merger with inadequate disclosure and at an inadequate and unfair price, or upon inequitable terms, all to the irreparable harm of plaintiffs and the other members of the Class.

68. Plaintiffs and the Class have no adequate remedy at law.

WHEREFORE, plaintiffs demand judgment as follows:

(a) Declaring this to be a proper class action and certifying plaintiffs as representatives of the Class;

(b) Ordering the Individual Defendants to carry out their fiduciary duties to plaintiffs and the other members of the Class by announcing their intention to:

i) cooperate fully with any person or entity, having a *bona fide* interest in proposing any transaction which would maximize stockholder value, including, but not limited to, a buyout or takeover of the Company;

ii) undertake an appropriate evaluation of MCA's worth as a merger/acquisition candidate;

iii) take all appropriate steps to enhance MCA's value and attractiveness as a merger/acquisition candidate;

iv) take all appropriate steps to effectively expose MCA to the marketplace in an effort to create an active auction for MCA;

v) act independently so that the interests of MCA's public stockholders will be protected;

vi) adequately ensure that no conflicts of interest exist between the Individual Defendants' own interest and their fiduciary obligation to maximize stockholder value or, if such conflicts exist, to ensure that all conflicts are resolved in the best interests of MCA's public stockholders; and

vii) adequately disclose the personal interests of and benefits to the Individual Defendants in the Merger;

viii) declaring that defendants and each of them have committed or aided and abetted a gross abuse of

trust and have breached their fiduciary and other duties to plaintiffs and the other members of the Class;

ix) preliminary and permanently enjoining defendants and their counsel, agents, employees and all persons acting under, in concert with, or for them, from proceeding with, consummating or closing the proposed transaction which will irreparably harm plaintiffs and the Class;

x) in the event the proposal is consummated, rescinding it and setting it aside, or awarding rescissory damages if it cannot be set aside;

(c) Ordering the Individual Defendants, jointly and severally, to account to plaintiffs and the Class for all damages suffered and to be suffered by them as a result of the acts and transactions alleged herein;

(d) Awarding plaintiffs the costs and disbursements of this action, including a reasonable allowance for plaintiffs' attorneys' and experts' fees; and

(e) Granting such other further relief as may be just and proper under the circumstances.

Dated: December 14, 1990

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In re MCA, INC. Shareholders Litigation
Civ. A. No. 11740

Court of Chancery of Delaware,
New Castle County.

Submitted: Jan. 30, 1991.
Decided: April 22, 1991.

HARTNETT, Vice Chancellor.

The Court must consider whether to approve the proposed settlement of this purported class action pursuant to Chancery Rule 23(e). Plaintiffs ("Settling Plaintiffs") in this action join the defendants in urging the approval of the settlement. The Objectors, who are not parties in this action but are the plaintiffs in a pending action in Federal Court in California, object to that part of the settlement which would bar their federal claims and request the opportunity to opt-out of the Class or to have the federal claims excluded from the settlement.

After reviewing the settlement, the Court finds that the State claims being compromised have little or no merit and therefore no value. The value of the settlement to the Class is also minimal. The claims asserted in the Federal Court, however, have at least arguable merit and therefore have significant value. This Court, on balance, finds, in its business judgment, that it would be unfair to bar the federal claims and therefore the settlement cannot be approved in its present form.

I. PROCEDURAL BACKGROUND

This action was commenced in this Court as a purported class action on behalf of the stockholders of MCA, Inc., a Delaware corporation ("MCA"), on September 26, 1990 -- one day after the public announcement that Matsushita Electric Industrial Co. Ltd. ("Matsushita") and MCA were negotiating a possible acquisition of MCA by Matsushita. The complaint named MCA and its directors as defendants. Although no agreement between MCA and Matsushita existed at that time, breaches of fiduciary duties were claimed on the

grounds that there was a failure by the directors of MCA to implement a market check procedure to ensure maximum shareholder value.

On November 26, 1990, MCA and Matsushita announced that they had entered into a Merger Agreement. Pursuant to the Merger Agreement, a wholly-owned subsidiary of Matsushita would make a cash tender offer for all MCA outstanding shares for $66 per share, conditioned upon the tender of at least 50% of the outstanding shares and the spinoff of a MCA wholly-owned subsidiary, known as Pinelands. The spinoff asset was a corporation that owned a television station that Matsushita was prohibited by federal law from acquiring. According to the Merger Agreement, 100% of Pinelands' stock was to be distributed to the MCA shareholders *pro rata* in the form of a stock dividend prior to the completion of the tender offer.

On December 3, 1990, an action was filed in the United States District Court for the Central District of California as *Epstein v. MCA, Inc., et al.*, No. CV-90-6451-R, ("the *Epstein* action"). It was alleged in that suit that Matsushita's tender offer involved a special deal for Lew R. Wasserman, MCA's chairman and chief executive officer. The Wasserman Agreement, apparently entered into contemporaneously with the MCA Merger Agreement, provided that immediately following completion of the tender offer, Mr. Wasserman would surrender his MCA stock in exchange for shares of preferred stock of the Matsushita subsidiary. The complaint further alleged that the Wasserman Agreement was in violation of Section 14(d)(7) of the Federal Securities Exchange Act of 1934 ("Federal Securities Act") (15 U.S.C. §78n(d)(7)) and SEC Rules 14d-10 and 10b-13. The *Epstein* action named Matsushita as a defendant claiming alleged securities laws violations and also named MCA and Mr. Wasserman as defendants because they allegedly aided and abetted Matsushita.

On December 14, 1990, plaintiffs in this Delaware action filed an Amended Complaint and at their request a preliminary injunction hearing was scheduled for December 18, 1990. The Amended Complaint added an allegation of a

failure to disclose a substantial conflict of interest involving defendants Wasserman, MCA management and its directors, based on a claim that Mr. Wasserman received preferential treatment. Matsushita was also named as a defendant in this Delaware action for the first time because it allegedly aided and abetted MCA in a breach of fiduciary duty by entering into a special deal with Wasserman. The Amended Complaint, however, did not challenge the Wasserman Agreement on the grounds that it constituted a breach of the Federal Securities Act as had been asserted in the federal court in California.

On December 18th, the parties in this Delaware action filed a Stipulation and Agreement of Compromise and Settlement (the "Settlement Agreement"). The settlement provided for a dismissal of the Delaware action with prejudice and for the release of all the claims of any member of the Class arising out of the transaction, including claims asserted in the federal *Epstein* action. On that same day, this Court provisionally certified the Class pursuant to Chancery Rule 23(b)(2), and set a hearing on on the proposed settlement for January 30, 1991.

The Matsushita tender offer was successfully completed about December 29, 1990 after the stock of the Pinelands subsidiary had been distributed to the MCA shareholders. About January 4, 1991, MCA merged into and with a Matsushita subsidiary.

On January 23, 1991, David Minton and Andrew Minton (the "Objectors") filed their objection to the proposed settlement insofar as it purports to bar the claims they have individually asserted in the federal suit in California.

II. LAW OF SETTLEMENTS

The law of Delaware strongly favors voluntary settlement of contested issues. *Nottingham Partners v. Dana*, Del.Supr., 564 A.2d 1089, 1102 (1989); *Polk v. Good*, Del.Supr., 507 A.2d 531, 535 (1986); *Rome v. Archer*, Del.Supr., 197 A.2d 49 (1964).

In the settlement of a class action, the Court's role is to protect the Class members by balancing the fairness and reasonable of the proposed settlement, with the policy favoring settlements. *Nottingham* at 1102; *Barkan v. Amstead Indus.*, Del.Supr., 567 A.2d 1279, 1283 (1989). The Court, in reviewing a settlement, should not decide the merits of the issues, but must consider the nature of the claims, the defenses asserted, and the factual and legal circumstances, and then apply its own business judgment to decide if the settlement is intrinsically fair. *Id.; Polk*, 507 A.2d at 536; *Nottingham*, 564 A.2d at 1102.

In determining if a proposed settlement should be approved, this Court must review various factors including the strengths and weaknesses of the asserted claims, the value of the benefit conferred on the Class by the settlement, and the risks, expenses, and delays of litigation. *Neponsit Investment Co. v. Abramson*, Del.Supr., 405 A.2d 97 (1979). The Court must especially balance the value of all the claims being compromised against the value of the benefit to be conferred on the Class by the settlement. *Sullivan v. Hammer*, Del. Ch., C.A. No. 10,823-NC, Hartnett, V.C. (Aug. 14, 1990), slip op. at p. 14, 1990 WL 114228 *app. pending* (upholding a settlement because there was adequate benefit to the class.)

III. EFFECT OF THE RELEASE

It is not disputed that this Court may enter a judgment in connection with the settlement of a class action that results in the release of both state law claims and exclusively federal claims if the claims arise from the same factual predicate, even if the state court could not dismiss or adjudicate the federal claims. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2nd Cir. 1982); *In re Mobile Communications Corporation of America, Inc., Consolidated Litigation*, Del. Ch., C.A. No. 10,627-NC *et seq.*, 1991 WL 1392 Allen, C. (Jan. 7, 1991) (approving a settlement of both state and federal claims as fair.) As a practical matter, a so-called "global settlement" is often necessary if any settlement at all will occur. *See, Raskin v. Birmingham Steel Corp.*, Del. Ch., C.A.

No. 11,365-NC, Allen, C. (Dec. 4, 1990), slip op. at 18, 1990 WL 193326 (holding that the settlement was not fair.)

When a state court settlement of a class action releases all claims which arise out of the challenged transaction and is determined to be fair and to have met all due process requirements, the class members are bound by the release or the doctrine of issue preclusion. Class members cannot subsequently relitigate the claims barred by the settlement in a federal court. *Nottingham Partners v. Trans-Lux Corp.*, 926 F.2d 29 (1st Cir. 1991); *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (2nd Cir.1968). A federal court is, however, free to review and determine the effect and scope of the release on the federal claims. *Nottingham Partners, supra; see also, In re Mobile, supra; Abramson, supra.*

Therefore, if this Court provides for the release of all the claims arising out of the challenged transaction, the claims which the Objectors have asserted in the federal suit will likely be forever barred.

IV. CLASS CERTIFICATION

On December 18, 1990 the Class was provisionally certified by this Court pursuant to Chancery Rule 23(b)(2), to consist of all owners of MCA common stock on September 25, 1990. At the time of the filing of the suit and on the date the settlement agreement was entered into, the complaint sought injunctive and other equitable relief, as well as monetary damages, on behalf of the Class.

The Objectors assert, however, that the federal securities law claims predominate over the state law claims and that these claims are purely money damage claims. They, therefore, assert that the Class can only be certified pursuant to Chancery Rule 23(b)(3), which allows objecting Class members to be excluded or to opt-out of the settlement.

The Objectors point out that on January 30, 1991, the day that the Settlement Hearing was held, the tender offer had been completed, the merger consummated, and the spinoff dividend had been paid. They also correctly assert that the

Settlement Agreement does not provide for any equitable relief. They, therefore, argue that no equitable remedy would have been appropriate at the tune of the Settlement Hearing. Additionally, they point out that the entire Class does not have an action for damages because only those persons who owned MCA stock on November 30, 1990 -- the day the Matsushita tender offer was commenced -- have a claim pursuant to the Federal Securities Act. 15 U.S.C. § 78n(d)(7). Because damages, if any, will vary from shareholder to shareholder, the Objectors also suggest that the Class should be certified pursuant to Chancery Rule 23(b)(3) to allow those shareholders with monetary claims to opt-out of the settlement, if they desire.

The Settling Plaintiffs and defendants counter that both the Delaware action and the *Epstein* federal action sought equitable relief at the time the complaints were filed, at the time the Settlement Agreement was entered into, and up until the time the merger was consummated. They therefore assert that the Class should be certified under Chancery Rule 23(b)(1) or (b)(2) which do not allow for any opting-out.

In the context of a settlement of a class action, certification under Chancery Rule 23(b)(l) or (b)(2) is appropriate when the primary relief sought is equitable in nature. *Nottingham*, 564 A.2d at 1094-96; *In re Mobile*, slip op. at 34; *Steiner v. Sithe-Energies, L.P.*, Del. Ch., C.A. No. 9511-NC, 1988 WL 36133, Hartnett, V.C. (Apr. 4, 1988) (approving a settlement without an opportunity to opt out.)

When a Class is certified pursuant to Chancery Rule 23(b)(8), however, and the Class is seeking only money damages, constitutional due process requires that dissenting Class members be given the opportunity to opt-out of the Class. *Phillips Petroleum, Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Schreiber v. Hadson Petroleum Corp.*, Del. Ch., C.A. No. 8513-NC, Hartnett, V.C. (Oct. 29, 1986), slip op. at 9-10, 1986 WL 12169 (appearing a settlement without an opportunity to opt out;) *Raskin*, slip op. at 12-13; *In re Mobile*, slip op. at 33-36.

An action, however, which consists primarily of equitable claims with an ancillary request for monetary damages, will not require a provision for opting-out. *Joseph v. Shell Oil Co.*, Del. Ch., C.A. No. 7450-NC, Hartnett, V.C. (Feb. 8, 1985), slip op. at 10, 1985 WL 21125 (holding certification under Chancery Rule 23(b)(1)(A) and 23(b)(2) proper.)

In the present case, the claims were clearly primarily equitable when initially filed. The Delaware complaint sought a preliminary injunction and declaratory judgment. The federal *Epstein* action sought the opportunity for the shareholders to make an election between the types of consideration being offered, based on an assumption that two types of consideration were being offered in the tender offer. At the time the Settlement Agreement was entered into and the Class provisionally certified, the tender offer was still pending and the merger had not been completed. The actions therefore still asserted primarily equitable claims. Like any agreement, a settlement should be reviewed from the perspective of the time at which it was entered into. *See Tull v. Turek*, Del.Supr., 147 A.2d 658, 661-62 (1958); *R. Zoppo Co., Inc. v. City of Dover*, 124 N.H. 666, 475 A.2d 12, 15 (1984). Subsequent events cannot change the character of what was settled on December 18, 1990.

I find, therefore, that certification of the Class pursuant to Chancery Rule 23(b)(2) is appropriate and no opportunity to opt out need be provided.

V. THE VALUE OF THE CLAIMS TO BE SETTLED

The next step in determining whether the proposed settlement should be approved is to weigh the value of the claims being settled and released by the settlement, against the value of the settlement to the class members, and then to apply the Court's business judgment to determine if the settlement is intrinsically fair. First to be considered is the value of the claims being released.

A. *The Delaware Action*

The plaintiffs in the Delaware action allege that the Board of Directors of MCA breached a fiduciary duty of care imposed upon them by *Revlon* and its progeny. The Amended Complaint added Matsushita as a defendant for allegedly aiding and abetting the claimed breaches. These claims are based on the duties imposed on directors to ensure that shareholders receive maximum value when a change of corporate control is inevitable. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del.Supr., 506 A.2d 173, 182 (1986). The Supreme Court of Delaware held in *Revlon* that when it is inevitable that a corporation is for sale, the directors' duty changes from an attempt to preserve the corporate entity, to that of an auctioneer to ensure the maximum value for the benefit of the shareholders. *Id.* at 182. Directors are not, however, required to follow a set course of action in the face of a change in corporate control. *Barkan*, 567 A.2d at 1286-87. Rather, they may choose various courses of action, but they must be guided by due diligence and good faith. *Id.*

There is nothing in the record to suggest that the directors of MCA did not act diligently or acted in bad faith. It is clear that the Matsushita/MCA Merger Agreement was a highly negotiated, arm's-length transaction. The price paid for MCA shares represented a 100% premium over the market price prior to public announcement of Matsushita/MCA discussions. Matsushita made a "last and final offer" of $64 per share which MCA's Board rejected and negotiated further to increase the offer to $66 per share. During two months of publicly reported negotiations, no other bidder emerged. The Merger Agreement provided for a "fiduciary out" which allowed MCA's Board to conduct a post-agreement market check and accept a higher offer. Again, no competing offer was made. MCA's Board successfully negotiated for the spinoff of 100% of Pinelands to MCA shareholders, thereby increasing stockholder value, over Matsushita's intent to retain an intent in that asset. Additionally, MCA's financial advisor expressed the opinion that the tender offer was fair and highly recommended the transaction.

It is clear, therefore, that the allegations of a breach of fiduciary duty by the directors of MCA in recommending the acceptance of the tender offer in the Delaware suit are without substantial merit.

Plaintiffs in the Delaware complaint also challenged the Wasserman Agreement as a breach of fiduciary duty by Wasserman. Under that agreement, Wasserman, *inter alia*, would receive preferred shares of a Matsushita subsidiary in exchange for his MCA common stock. The preferred stock was redeemable at either party's option after five years. The redemption price is an amount equal to the liquidation preference ($5,000 per share) plus all unpaid dividends. The stock contains the right to an 8.75% annual cumulative dividend. This agreement was entered into on November 26, 1990, just before the tender offer was announced and it was to be consummated immediately following the close of the tender offer.

Defendants allege that the Wasserman Agreement did not violate any Delaware law and that it had a valid business purpose of ensuring continuity of management.

This claim of plaintiffs is also weak. A shareholder is not prohibited, by his status as a director, from dealing in the shares of the corporation. It is when the director uses inside information for his own benefit that he has abused his office and thus breached his duty of loyalty. *Brophy v. Cities Service Co.*, Del. Ch., 70 A.2d 5, 7 (1949).

There is no evidence that Mr. Wasserman used inside information to achieve a personal benefit for himself. The deal was also fully disclosed in Matsushita's Offer to Purchase.

I therefore find that the asserted state law claims are, at best, extremely weak and, therefore, have little or no value.

B. *Federal Securities Claims*

While the Objectors do not object to the settlement and bar of the state law claims as asserted in the suit filed in this Court, they do object to the barring of the federal security

violation claims that they have asserted in the federal action in California and which were never asserted in this Delaware action. The Objectors, in their federal suit in California, claim that the Wasserman Agreement violates SEC Rule 10b-13 and Section 14(d)(7) of the Federal Securities Act -- more specifically, SEC Rule 14d-10 promulgated thereunder.

C. *SEC Rule 10b-13 Violations*

SEC Rule 10b-13 provides in pertinent part:

> No person who makes a cash tender offer . . . for any equity security shall purchase . . . any such security otherwise than pursuant to such tender offer.

17 C.F.R. § 240.10b-13 (1969). This prohibition attaches at the earliest of either the announcement of the offer or the commencement of the offer and ends at the time the tendered shares must be accepted or rejected by the offerer. *Id.* The purpose of this rule is to protect shareholders who have tendered into a tender offer by prohibiting the Offeror from making an offer outside the tender offer on different terms. The SEC perceives any "outside deal" whether for a higher or lower price, to be detrimental to the shareholders who tendered. SEC Release No. 8712 [1969-1970 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶77,745 (Oct. 8, 1969).

The Objectors first claim that the Wasserman Agreement violates SEC Rule 10b-13 because it was entered into earlier on the same day that the tender offer was announced and it provided for the purchase of MCA common stock otherwise than pursuant to the tender offer. They therefore claim, in effect, that the Wasserman Agreement was actually part of the tender offer.

The Settling Plaintiffs and the defendants respond that SEC Rule 10b-13 does not apply to the Wasserman transaction. According to them, because the Wasserman Agreement was entered into earlier on the same day as the public announcement of the tender offer, it was entered into before the prohibition of SEC Rule 10b-13 attached. The consummation of the deal was to take place immediately following the

acceptance of the tendered shares. Therefore, they claim, the Wasserman transaction falls outside the scope of SEC Rule 10b-13.

Settling Plaintiffs and defendants also assert that SEC Rule 10b-13 does not apply to private purchases. *City Nat. Bank v. American Com. Financial Corp.*, 801 F.2d 714, 717 (4th Cir. 1986). Although this is a correct assertion, the line between a private and public purchase has not yet been clearly drawn. *See, Heine v. The Signal Companies, Inc.*, [1976-1977 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶96,049, 1977 WL 930 (S.D.N.Y.1977). *Cf. Cattlemen's Investment Co. v. Fears*, 343 F.Supp. 1248 (W.D. Okla.1972) with *Nachman Corp. v. Halfred, Inc.*, [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,445, 1973 WL 457 (N.D. Ill.1978).

It is not disputed that Matsushita made public purchases of MCA stock through a tender offer. What is disputed is whether the Wasserman Agreement, because of its timing, can be considered to be a part of that tender offer for the purposes of SEC Rule 10b-13. This issue has not yet been definitively addressed by the courts and therefore this claim of Objectors clearly has arguable merit.

D. *SEC Rule 14d-10 Violations*

The second federal securities violation asserted by the Objectors is based on SEC Rule 14d-10, promulgated under Section 14(d)(7) of the Federal Securities Act. This is the "all holders/best price" rule. Pursuant to Rule 14d-10 more than one type of consideration may be offered to shareholders only if "security holders are afforded equal right to elect among each of the types of consideration offered." 17 C.F.R. §240.14d-10 (1986). According to the Objectors, Matsushita offered Wasserman a tax-free stock exchange, while those who tendered into the offer would receive fully taxable cash. The Objectors assert that the Wasserman Agreement therefore violates SEC Rule 14d-10 because those who tendered into the offer were not afforded the equal right to choose between the two types of consideration offered.

Settling Plaintiffs and defendants assert, however, that the plain language of SEC Rule 14d-10 bars the Objectors' claim. While they concede that SEC Rule 14d-10(c) requires that shareholders be given the opportunity to elect between different types of consideration being offered, they assert that subdivision (c) only applies if subdivision (a) is violated. SEC Rule 14d-10(a) applies when one offeree is receiving higher value than other offerees. Defendants argue that subdivision (a) was not violated because the value of Wasserman's preferred stock is substantially less than the cash consideration offered by Matsushita in the tender offer.

Objectors' claim of a violation of SEC Rule 14d-10 also seems to have at least arguable merit. There were two types of consideration offered in the tender offer: one was cash and the other was securities. Although it is claimed that the value of the consideration given to Wasserman had less value than the cash offered to the other stockholders, the true economic value of the Wasserman consideration is uncertain. Therefore, SEC Rule 14d-10(c) may have requited that the shareholders should have been given the opportunity to have made an election as to which consideration to receive. This issue has also never been definitively addressed by the courts and this claim therefore also has at least arguable merit.

This Court must carefully scrutinize a settlement that has the effect of barring claims of at least arguable merit that were never asserted in Delaware but were asserted in a suit elsewhere, especially if the settlement has little or no value to the class. *Cf. Selfe v. Joseph*, Del. Supr., 501 A.2d 409 (1985).

VI. THE VALUE OF THE PROPOSED SETTLEMENT

In consideration for the release of all claims, known or unknown, in both the Delaware action and the federal *Epstein* action, defendants offer to pay plaintiffs' attorneys fees in this Delaware action of up to $1 million. This generous payment, of course, confers no benefit on the members of the Class. The settlement also provides that the Pinelands subsidiary will adopt an altered Shareholders Rights Plan ("poison pill").

The altered poison pill will provide that it will be redeemed: if a fully financed cash tender offer is made for Pinelands; is held open for at least sixty days; and 66 2/3% of the outstanding shares are tendered into the offer. The defendants argue that amending the existing poison pill will encourage a third party to make a bid for Pinelands, thus resulting in increased value for the MCA shareholders (the Class) who received the Pinelands stock dividend. Significantly, the altered poison pill need be in effect for only one year.

Objectors correctly point out that because management owns 26% of Pinelands outstanding stock, in order for the pill to be redeemed against the wishes of management, 90% of Pinelands stock would have to be tendered into the offer (excluding management's shares).

The Objectors also provided the Court with a copy of the Certificate of Incorporation of Pinelands that contains numerous anti-takeover devices of such magnitude as to make the poison pill merely icing on the cake.

The value to the Class from the Pinelands revised poison pill is therefore illusionary and the revision apparently was proposed merely to justify a settlement which offers no real monetary benefit to the Class.

VII. CONCLUSION

In summary, there is no real monetary benefit to the Class members from the settlement and the only claims which have any substantial merit are the claims asserted by the Objectors in the California federal suit that were not asserted in this Delaware action. It would, therefore, be unfair to compel the release of the federal claims by approving the settlement in its present form. The Court finds, therefore, in its business judgment, that the Settlement Agreement, as presently constituted, is not fair and must be rejected.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

----------x

IN RE MCA INC.	:	
CONSOLIDATED	:	C.A. NO. 11740
SHAREHOLDERS	:	
LITIGATION	:	

----------x

STIPULATION AND AGREEMENT OF COMPROMISE AND SETTLEMENT

The parties to the above-captioned civil action, by and through their undersigned attorneys, have entered into the following Stipulation and Agreement of Compromise and Settlement (the "Stipulation" or "Settlement") subject to the approval of the Court:

WHEREAS:

A. On September 25, 1990, it was reported in the financial press that MCA INC. ("MCA") was discussing a possible acquisition of MCA by Matsushita Electric Industrial Co., Ltd. ("Matsushita"); and

B. On September 26, 1990 and September 27, 1990, three putative class actions, brought on behalf of all public shareholders of MCA, were filed in the Court of Chancery, entitled *Lazar, et al. v. MCA INC., et al.*, No. 11740 (filed Sept. 26, 1990) (the "*Lazar* Action"); *Stepak, et al., v. MCA INC., et al.*, No. 11741 (filed Sept. 26, 1990); and *Naphtali, et al, v. MCA INC., et al.*, No. 11747 (filed Sept. 27, 1990) (collectively, unless otherwise indicated, the "Delaware Actions"). The Delaware Actions sought, among other things, an order directing MCA to take all appropriate steps to effectively expose MCA to the marketplace in an effort to obtain a transaction which would yield the greatest value for the

stockholders of the Company. Named as defendants in the Delaware Actions were MCA and its directors: Lew R. Wasserman ("Wasserman"), Thomas V. Jones, Robert S. Strauss, Thomas Wertheimer, Howard H. Baker, Jr., Thomas P. Pollack, Felix G. Rohatyn, Sidney J. Sheinberg ("Sheinberg"), Howard P. Allen, Mary Gardiner Jones, and Charles S. Paul. Upon consent of all parties, and by Stipulation and Order dated October 2, 1990, the Court consolidated the Delaware Actions under the caption *In Re MCA INC. Shareholders Litigation*, Consolidated C.A. No. 11740; designated the Complaint in the *Lazar* Action as the Complaint in the Delaware Actions; and appointed as co-lead counsel the firms of Milberg Weiss Bershad Specthrie & Lerach; Abbey & Ellis; Berger & Montague; and Wolf, Popper, Ross, Wolf & Jones ("Plaintiffs' Lead Counsel"); and

C. On September 26, 1990, a putative class action, brought on behalf of all public shareholders of MCA, was filed in the Superior Court of California, entitled *Lazar, et al. v. MCA INC., et al.*, No. BC011305, and on October 2, 1990, a stockholders' derivative action, brought on behalf of MCA, was filed in the Superior Court of California, entitled *MCA INC., derivatively by Robert Silverstein v. Lew R. Wasserman, et al.*, Case No. BC011572 (collectively, the "California State Actions"). The California State Actions (which were ultimately dismissed without prejudice on September 20, 1991), asserted substantially similar claims and sought substantially similar relief as the claims asserted and the relief sought in the Delaware Actions; and

D. (i) On November 26, 1990, MCA and Matsushita announced that they had entered into an Agreement and Plan of Merger (the "Merger" and the "Merger Agreement"). Pursuant to the Merger Agreement, Matsushita Acquisition Corp. ("Matsushita Acquisition"), an indirectly wholly-owned subsidiary of Matsushita, agreed, among other things, to make a tender offer for all outstanding shares of MCA common stock at $66 per share (the "Tender Offer"). Following successful completion of the Tender Offer, upon the terms and subject to the conditions of the Merger Agreement and the Delaware

General Corporation Law, Matsushita Acquisition Corp. merged with and into MCA, effective January 3, 1991. The Merger consideration was the same price per share paid in the Tender Offer; and

(ii) Pursuant to a Capital Contribution and Loan Agreement (the "Capital Contribution Agreement") between Lew R. Wasserman, Matsushita, and Matsushita Holding Corp. ("Matsushita Holding"), a wholly-owned subsidiary of Matsushita, Wasserman agreed to and did contribute, following the acceptance for payment of MCA shares in the Tender Offer, 4,953,927 shares of MCA common stock in exchange for preferred stock in Matsushita Holding. The Preferred Stock received by Wasserman had an aggregate liquidation preference equal to $66 multiplied by the number of shares of common stock contributed by Wasserman. The Preferred Stock provides for the payment of an annual cumulative 8.75% dividend; and

(iii) MCA also entered into certain employee compensation arrangements (as described in the Solicitation/ Recommendation Statement of MCA filed on November 30, 1990 on SEC Schedule 14D-9). Matsushita further entered into agreements with Sidney J. Sheinberg and David Geffen (the "Tender Agreements") providing for such individuals to tender their MCA shares into the Tender Offer; and

(iv) MCA and an MCA subsidiary which held MCA's broadcasting assets simultaneously entered into a separate Distribution Agreement pursuant to which ownership of MCA's broadcasting assets were spun-off 100% to the MCA shareholders. The consummation of the Tender Offer for MCA's shares was conditioned upon MCA's broadcasting assets having been spun-off; and

E. Following public announcement of the Merger Agreement, counsel for plaintiffs in the Delaware Actions informed counsel for defendants that they intended to seek preliminary injunctive relief against consummation of the Merger Agreement, and they initially undertook to state the bases for such injunction motion and describe the claims against the Merger

Agreement in writing by December 4, 1990, and later to file an amended complaint; and

F. By letter dated November 27, 1990, the Delaware Chancery Court advised plaintiffs that their application for preliminary injunctive relief would be heard on December 20, 1990. The hearing date was subsequently changed to December 18, 1990; and

G. By letter to defendants' counsel dated December 4, 1990 (sometimes referred to herein as the "December 4, 1990, Claim Letter") pursuant to a stipulated procedure submitted to the Court, co-lead counsel for plaintiffs in the Delaware Actions set forth the claims upon which plaintiffs based their motion for a preliminary injunction. These claims advanced by plaintiffs included, among other things, the claims that (i) defendants failed to fulfill their duty to maximize shareholder value and had failed to obtain fair value in the Merger Agreement; (ii) defendants had breached their duty of making fair and full disclosures concerning the Merger Agreement, including, among other things, failing to disclose material facts concerning the compensation and bonus payments to certain individuals contemplated in the Merger Agreement, and that defendants allegedly intended to retain control over WWOR-TV following spin-off of MCA's broadcast assets to shareholders; (iii) defendants breached their duty of candor by failing to disclose material information concerning the operating segments of MCA that was provided to Matsushita; (iv) defendants breached their fiduciary duties by according "preferential treatment" to defendant Lew R. Wasserman in connection with the Tender Offer, in that "Mr. Wasserman . . . impermissibly negotiated preferential arrangements in connection with the transaction whereby he . . . exchange[d] stock for stock and avoid[ed] costly capital gains taxes to which all other stockholders [were] subject"; and (v) defendants violated SEC Rule 13e-3 because Mr. Wasserman's receipt of preferred stock allegedly established that the transaction was a "going-private" transaction under SEC Rule 13e-3 of the Securities Exchange Act of 1934, and defendants allegedly failed to comply with the requirements of SEC Rule

13e-3 governing such transactions. The December 4 claim letter stated that plaintiffs' counsel intended to consider whether to modify and/or supplement the claims and legal theories contained in the claim letter as discovery and briefing proceeded; and

H. On December 3, 1990, a putative class action complaint entitled *Epstein v. MCA INC., et al.*, No. CV-90-6451-R, brought on behalf of a class of all shareholders of MCA, was filed in the United States District Court for the Central District of California (the "Federal District Court") (hereinafter, the "*Epstein* Action"). The complaint in the *Epstein* Action, as amended on December 6, 1990, alleged that the arrangements whereby defendant Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding Corp. pursuant to the Capital Contribution Agreement (i) violated SEC Rule 10b-13 because it allegedly entailed a purchase of MCA stock by Matsushita outside the Tender Offer during the Tender Offer period, and (ii) violated SEC Rule 14d-10 because the preferred stock received by Wasserman allegedly was different or greater consideration than that made available to public shareholders in the Tender Offer. The complaint was subsequently amended to include a similar claim under SEC Rules 10b-13 and 14d-10 that a payment to defendant Sheinberg, which defendants asserted was a bonus payment derived from the level of incentive compensation that had been expected to be awarded to Sheinberg in the ordinary course but for the acquisition, allegedly constituted additional consideration for his MCA shares. The complaint sought preliminary and permanent injunctive relief and monetary damages. The *Epstein* Action complaint, as subsequently amended, named as defendants MCA, Matsushita, Matsushita Acquisition, Matsushita Holding, and Wasserman and Sheinberg; and

I. In or around the beginning of December 1990, plaintiffs' counsel in the Delaware Actions obtained extensive document discovery from defendants and their financial advisors, and thereafter took the depositions of certain defendants (including defendants Wasserman, Sheinberg and Howard P. Allen); and

J. Commencing on or about November 29, 1990, counsel for defendants and counsel for plaintiffs engaged in discussions concerning possible settlement of the dispute between the parties. Thereafter, a meeting was held between counsel for the parties and settlement negotiations began in earnest. During those settlement discussions, which continued through December 11, 1990, plaintiffs sought to enhance the terms of the transaction and in particular, sought improvements in the terms of the shareholder rights plan of the spin-off company with a view towards increasing the value of the shares of the spin-off company to be distributed to MCA shareholders; and

K. Following these negotiations, on December 11, 1990, an agreement in principle between the parties hereto was reached providing, as described in ¶ N below, for the compromise, release and settlement of the claims asserted in the Delaware Actions, the California State Actions, and the *Epstein* Action (hereinafter, the "Initial Proposed Settlement"); and

L. On December 11, 1990, the Federal District Court was advised of the existence of the Initial Proposed Settlement and set December 28, 1990, as the date for a hearing on a motion for summary judgment made by the *Epstein* plaintiff, who contended that the Tender Offer violated SEC Rules 10b-13 and 14d-10 and should be enjoined. Counsel for plaintiff in the *Epstein* Action stated that his client in *Epstein*, a member of the proposed class in the Delaware Actions, would seek to exclude himself from the Initial Proposed Settlement and that he wished to continue to litigate the claims asserted in the *Epstein* complaint; and

M. An amended consolidated complaint (the "Amended Complaint") in the Delaware Actions was filed on December 14, 1990, which encompasses the claims set forth in the December 4, 1990, Claim Letter. The defendants in the Amended Complaint are MCA, Matsushita, Matsushita Holdings, Matsushita Acquisition, Wasserman, Sheinberg, Thomas P. Pollack, Thomas Wertheimer, Charles S. Paul, Howard H. Baker, Robert S. Strauss, Felix G. Rohatyn, Thomas V. Jones, Howard P. Allen and Mary Gardiner Jones, all

of whom are alleged to have participated in the wrongs alleged in the Amended Complaint. The claims alleged in the Amended Complaint are, *inter alia*, that (i) the individual defendants breached their fiduciary duty to MCA's shareholders by failing to adopt methods calculated to obtain the highest per share value in the sale of MCA, including their alleged failure to use "market check" mechanisms to assure the fairness of the acquisition terms; (ii) the individual defendants breached their fiduciary duty to MCA's shareholders by failing to obtain a fair price per share in the sale of MCA; (iii) the individual defendants treated Matsushita as a preferred bidder, in alleged violation of their fiduciary duty; (iv) the individual defendants, MCA and Matsushita entered into allegedly impermissible preferential treatment arrangements for the treatment of defendant Wasserman's MCA stock holdings, specifically with respect to the transaction by which he exchanged his MCA stock for preferred stock of a Matsushita subsidiary pursuant to the Capital Contribution Agreement, and that the purpose of such preferential treatment was to allow defendant Wasserman to avoid tax liability on the sale of his MCA stock which other MCA stockholders will not be able to avoid; (v) the disclosures made by defendants in connection with the Tender Offer, including without limitation the disclosures contained in Matsushita's Offer to Purchase and Schedule 14D-1, and the disclosures contained in MCA's Schedule 14D-9, were deficient and contain material omissions and misrepresentations, including omissions and misrepresentations with respect to the disclosure of the arrangements concerning receipt of preferred stock by defendant Wasserman pursuant to the Capital Contribution Agreement, and with respect to arrangements regarding benefits and compensation for members of MCA management; (vi) that the MCA board was allegedly not composed of a majority of directors without conflicts of interest with respect to the Merger Agreement; (vii) that the individual defendants allegedly intended to retain effective control over MCA's broadcasting assets after the spin-off of such assets, and that defendants -through adoption of an overly restrictive "poison pill" shareholder rights plan -- intended to prevent the

emergence of market forces which could result in a sale of the spin-off company at a price representing maximum value for shareholders; (viii) that defendants breached their duty of candor by failing to disclose certain allegedly material information concerning the operating segments of MCA, which information was allegedly provided to Matsushita; (ix) that defendants failed to disclose, in violation of their duty of candor, certain prior market contacts between MCA and other potential purchasers and other material information required to be disclosed pursuant to SEC Rule 13e-3; (x) that the arrangements for employee compensation, including certain employment agreements, bonus payments, and payments with respect to options, violated defendants' fiduciary duties, and were not fully and fairly disclosed; and (xi) the individual defendants agreed in the Merger Agreement to treatment of MCA's Yosemite assets that was allegedly not in the best interests of MCA's shareholders. The Amended Complaint seeks predominantly equitable relief, or, alternatively, damages; and

N. On December 17, 1990, a Stipulation of Settlement was executed between counsel for the parties to the Delaware Actions reflecting the terms of the Initial Proposed Settlement (hereinafter, the "Initial Stipulation"). Pursuant to the Initial Stipulation:

(i) MCA agreed, *inter alia*, to cause its wholly-owned subsidiary holding its broadcast assets, which by the terms of a Distribution Agreement entered into simultaneously with the Merger Agreement was to be spun-off to MCA shareholders pro rata prior to Matsushita's purchase of shares pursuant to the Tender Offer (the "Spin-off Company"), to adopt a common stock shareholder rights plan that provided, *inter alia*, that, if a fully financed cash tender offer for all of the shares of Spin-off Company common stock was commenced and held open for at least 60 days, then the rights would be automatically redeemed at the redemption price of one cent per share immediately prior to the closing of such offer, provided that at least 66-2/3% of the outstanding shares of Spin-off Company common stock were tendered into such offer and

not withdrawn; that the "flip-in" threshold under such Rights Plan would be 15%; and that these provisions would not be amended for a period of at least one year from the adoption of the plan; and

(ii) Subject to Court approval, all claims and causes of action asserted in the Delaware Actions, the California State Actions, and the *Epstein* Action, including all claims arising under Delaware common law and the federal securities laws (including the federal securities laws claims asserted in the *Epstein* Action), would be settled, released and discharged; and

(iii) Counsel for the parties agreed to request the Court to enter an order providing that the Delaware Actions may proceed for settlement purposes as a class action, pursuant to Chancery Court Rules 23(b)(1) and (b)(2), on behalf of all holders of MCA common stock from September 25, 1990, and their successors in interest, immediate or remote (excluding defendants and members of their immediate families) (hereinafter, the "Initial Settlement Class").*/

O. On December 18, 1990, this Court entered an Order which, among other things, provisionally certified the Initial Settlement Class pursuant to Rules 23(b)(1) and (2) of the Court of Chancery; scheduled a hearing for January 30, 1991, to determine whether the Initial Settlement embodied in the Initial Stipulation was fair, reasonable and adequate and should be approved by the Court; and provided for the mailing of notice of the Initial Settlement to members of the Initial Settlement Class; and

P. On December 28, 1990, the Federal District Court denied the *Epstein* plaintiff's motion for summary judgment. No appeal therefrom was sought to be taken. The Tender Offer

*/ In August 1992, all of the common shares of the Spin-off Company (which was named Pinelands, Inc.) were acquired at a cash price of $18.1184 per Pinelands, Inc. share by BHC Communications Inc. pursuant to an Agreement and Plan of Merger dated as of May 7, 1992.

expired as scheduled on December 29, 1990, with virtually all of the MCA common shares having been tendered. A second-step cash merger was then consummated on January 3, 1991, by which MCA became a wholly-owned subsidiary of Matsushita; and

Q. On January 23, 1991, David Minton and Andrew Minton (purported shareholders of MCA), served a Notice of Intent to Appear and Object to the Initial Proposed Settlement (hereinafter, the "Objection" and the "Objectors"). In principal part, the Objectors argued that the Initial Proposed Settlement improperly purported to release and discharge the claims asserted in the *Epstein* Action without affording members of the putative class the opportunity to opt out of the class and thus not be bound by the proposed release of the federal securities laws claims contained in the Initial Stipulation, and that the claims asserted in the *Epstein* Action were substantial and valuable claims; and

R. On January 30, 1991, a hearing was held before this Court in accordance with the December 18, 1990, Order during which the Court heard and considered, *inter alia*, (i) plaintiffs' application for final approval of the Initial Proposed Settlement; (ii) the arguments pursuant to the Objection; and (iii) plaintiffs' counsels' application for attorneys' fees and reimbursement of expenses; and

S. On April 22, 1991, this Court rendered its decision and order (the "Decision and Order") with respect to plaintiffs' application for final approval of the Initial Proposed Settlement and the arguments raised by the Objectors. Pursuant to the Decision and Order, the Court ruled, *inter alia*, that certification of the Initial Settlement Class pursuant to Chancery Court Rule 23(b)(2) was appropriate, and that contrary to the arguments raised by the Objectors, no opportunity to opt out by members of the Initial Settlement Class was required. However, the Court rejected plaintiffs' application for final approval of the Initial Proposed Settlement, concluding in this regard that the benefits to be conferred pursuant to the Initial Stipulation were not sufficient consideration for the release

and dismissal of the claims asserted in the Delaware Actions and the federal claims asserted in the *Epstein* Action. The Court stated in its Decision and Order, *inter alia*, that the state law claims proposed to be settled had "little or no merit and therefore no value"; that the value of the Initial Proposed Settlement was "also minimal"; and that the federal claims asserted in the *Epstein* Action "have at least arguable merit and therefore significant value." As to such federal claims, the Court found that the issues raised by such claims had "not yet been definitively addressed by the courts" and therefore the claims had "arguable merit." The Court concluded "that it would be unfair to bar the federal claims and therefore the settlement cannot be approved in its present form"; and

T. During December 1990 and January 1991, four purported class actions, brought on behalf of MCA shareholders, were filed in the Federal District Court, entitled *Linder v. MCA INC., et al.*, No. CV-90-6744-KN (filed on December 18, 1990) (the "*Linder* Action"); *Rockford v. MCA INC., et al.*, No. CV-90-6744-JMI (filed on December 18, 1990) (the "*Rockford* Action"); *Karlin, et al. v. MCA INC., et al.*, No. CV-90-6775-R (filed December 18, 1990) (the "*Karlin* Action"); and *Minton v. MCA INC., et al.*, No. CV-91-0336-R (filed on January 17, 1991) (the "*Minton* Action"). The *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action assert substantially similar claims and seek substantially similar relief as the claims asserted and the relief sought in the *Epstein* Action. Unless otherwise indicated, the *Epstein* Action, the *Linder* Action, the *Rockford* Action, the *Karlin* Action and the *Minton* Action -- all of which were consolidated by the Federal District Court on April 1, 1991 -- are collectively referred to herein as the "California Federal Actions", and the plaintiffs in the California Federal Actions are hereinafter referred to as the "Federal Plaintiffs"; and

U. Subsequent to the Court's Decision and Order, the following events occurred in one or all of the California Federal Actions: (i) On April 1, 1991, the Federal District Court denied the second motion by one of the Federal Plaintiffs for summary judgment on the SEC Rule 10b-13 and 14d-10

claims, and denied the Federal Plaintiffs' first motion for class certification; (ii) On July 1, 1991, the Federal District Court granted the Matsushita defendants' motion to dismiss the claims asserted against them under SEC Rule 10b-13 on the ground that no private right of action exists under that provision, and dismissed all claims asserted against MCA and Messrs. Wasserman and Sheinberg for failure to state a claim as to them; (iii) On September 3, 1991, the Federal District Court denied the Federal Plaintiffs' second motion for class certification; (iv) On November 4, 1991, prior to the completion of discovery, the Federal District Court denied a motion for summary judgment by the Matsushita defendants against the remaining Rule 14d-10 claim, while also denying the third motion for summary judgment by the Federal Plaintiffs; (v) on December 9, 1991, the Federal District Court enjoined the Federal Plaintiffs and their counsel from commencing any new litigation arising out of the MCA acquisition in any forum, without prior leave of the Federal District Court; (vi) On December 16, 1991, the Federal District Court denied the Federal Plaintiffs' motion to amend their complaint to assert additional claims under Sections 14(d)(7) and 14(e) of the Williams Act; (vii) On January 6, 1992, the Federal District Court denied plaintiff in the *Minton* Action leave to amend his complaint to assert a claim under Section 14(d)(7) of the Williams Act; (viii) On January 13, 1992, the Federal District Court permitted the voluntary dismissal of all of the plaintiffs in the *Karlin* Action from the California Federal Actions; (ix) On January 27, 1992, after full briefing and a hearing, the Federal District Court found each of the Federal Plaintiffs, including the *Karlin* plaintiffs, and their counsel, in contempt of Court for their continued failure to provide Matsushita with all discovery ordered to be produced in the Federal District Court's Order of November 4, 1991, and subsequently awarded sanctions to Matsushita in the amount of $15,000; (x) On February 10, 1992, the day before trial on the merits was set to commence, and after the completion of discovery, the Federal District Court granted the Matsushita defendants' motion for summary judgment dismissing the remaining claim under SEC Rule 14d-10 and permanently enjoined the

Federal Plaintiffs and their counsel, and all persons in active concert or participation with them (or having notice of the order), from commencing litigation in any forum involving claims or defenses arising out of the same transactions as the California Federal Actions between the parties, without prior leave of the Federal District Court; (xi) On March 3, 1992, upon the Matsushita defendants' motion to supplement the record, the Federal District Court found that plaintiff and purported class representative Lawrence Epstein prosecuted the California Federal Actions for 15 months under false pretenses because he deliberately concealed that the MCA stock owned by him was held in a tax-free individual retirement account. The Federal District Court found that this fact demonstrated that plaintiff Epstein did not and could not have sustained any injury as a result of the Tender Offer, and, if known, would have disqualified him as a plaintiff in the California Federal Actions; and

V. Plaintiffs in the California Federal Actions have appealed the Federal District Court's dismissals of their actions to the United States Court of Appeals for the Ninth Circuit. The Federal Plaintiffs also appealed the denials of their motions for class certification and other rulings made by the Federal District Court, including the contempt ruling referred to above; and

W. On October 30, 1991, David and Andrew Minton, children of plaintiff Walter Minton, filed a putative class action complaint in the Federal District Court, entitled *Minton, et al., v. MCA INC., et al.*, No. CV-91-5914-R (hereinafter, the "Second *Minton* Action"). The complaint in the Second *Minton* Action, as amended on December 9, 1991, sought monetary damages for alleged violation of SEC Rules 10b-13 and 14d-10 and Section 14(d)(7) of the Williams Act. The amended complaint alleged that the arrangements whereby defendant Wasserman exchanged his MCA stock for preferred stock in Matsushita Holding Corp. pursuant to the Capital Contribution Agreement (1) violated SEC Rule 10b-13 because it allegedly represented a purchase of MCA stock by Matsushita during the period covered by the Rule that was not

pursuant to the Tender Offer, and (2) violated Section 14(d)(7) of the Williams Act and SEC Rule 14d-10 because such preferred stock received by Wasserman allegedly represented different and/or greater consideration than that made available to public shareholders in the Tender Offer. By Order dated February 11, 1992, the Federal District Court granted defendants' motion to dismiss the amended complaint, finding that it was filed in bad faith and that plaintiffs and their father, Walter Minton, were aligned in interest. Plaintiffs David and Andrew Minton have appealed the Federal District Court's dismissal of their complaint to the United States Court of Appeals for the Ninth Circuit. The appeals filed in the California Federal Actions and the Second *Minton* Action (Nos. 92-55288, 92-55632, 92-55675, 9255677) are pending, with briefing scheduled to be completed by the end of this year, and no date for argument of the appeals has been set by the Court of Appeals.

X. On November 4, 1991, a putative class action, allegedly brought on behalf of all shareholders of MCA as of the close of trading on November 23, 1990, was commenced against Lazard Freres & Co. ("Lazard") in the Supreme Court of the State of New York, County of New York, entitled *Epstein v. Lazard Freres & Co.*, No. 31127/91 (hereinafter, the "Second *Epstein* Action"). The complaint in the Second *Epstein* Action alleged that Lazard, which served as financial advisor to MCA in connection with its acquisition by Matsushita, was negligent and breached a fiduciary duty in its advice to MCA concerning the fairness of the transaction price, and that Lazard had a conflict of interest with respect to its MCA engagement. The complaint seeks damages, and alleges that the difference between the value paid to the shareholders in the acquisition and "fair value" represents "damages of no less than approximately $250 million and possibly as much as $1.2 billion"; and

Y. By decision dated September 24, 1992, the New York court granted a motion by Lazard to dismiss the Second *Epstein* Action with prejudice under principles of *res judicata* in

light of the entry of judgment in favor of the defendants and against the plaintiffs in the California Federal Actions; and

Z. From and after this Court's Decision and Order declining to approve the Initial Proposed Settlement, counsel for the parties in the Delaware Actions continued to discuss a possible alternative resolution of the Delaware Actions. In February, 1992, following the Federal District Court's decision to dismiss the remaining claim in the California Federal Actions, these discussions developed into negotiations in earnest regarding an alternative settlement of the Delaware Actions. On June 18, 1992, counsel for the parties arrived at an agreement in principle to settle the Delaware Actions, subject to the execution of a formal Stipulation of Settlement and Court approval thereof; and

AA. Based on their review and analysis of the relevant facts and controlling legal principles, the document and deposition discovery obtained in the Delaware Actions, their review of relevant pleadings and proceedings in the California Federal Actions, the Second *Minton* Action, and the Second *Epstein* Action, and their analysis and understanding of this Court's reasoning and holdings in the Decision and Order, plaintiffs' attorneys in the Delaware Actions have concluded that the terms and conditions of the Settlement hereinafter set forth are fair, reasonable and adequate, and beneficial to and in the best interests of plaintiffs and the proposed Settlement Class (as defined below). Plaintiffs have agreed to settle the Delaware Actions pursuant to the terms and provisions of this Stipulation after considering (i) the substantial monetary benefits that former MCA shareholders will receive pursuant to the Settlement; (ii) the Court's evaluation of the claims asserted in the Delaware Actions as reflected in the Decision and Order; (iii) the attendant risks and delays of continued litigation; (iv) uncertainties relating to proof of the allegations asserted in the Delaware Actions; (v) the Federal District Court's disposition of the federal securities claims asserted in the California Federal Actions and the Second *Minton* Action; (vi) the impact of principles of *res judicata* on the viability of the Second *Epstein* Action in light of the Federal District

Court's disposition of the California Federal Actions, including the decision of the New York court to dismiss the Second *Epstein* Action with prejudice on *res judicata* grounds; and (vii) the fact that the present Settlement allows members of the Settlement Class (defined below) to exclude themselves from the Settlement Class should they so desire and thereby not be precluded by the Settlement from individually seeking to pursue the claims alleged in the Delaware Actions, the California Federal Actions, the Second *Minton* Action, the Second *Epstein* Action or any other claims relating to the events at issue in the Delaware Actions; and

BB. Defendants vigorously deny all liability or wrongdoing with respect to any and all of the claims alleged in the Delaware Actions, but consider it desirable that the Delaware Actions be settled because such settlement will (i) avoid the substantial expense, inconvenience and distraction of continued litigation in the Delaware Actions, or any other action or proceeding relating to the matters being settled, and (ii) finally put to rest plaintiffs' claims and all other claims relating to the matters being settled.

In light of the foregoing, the parties propose to settle the Delaware Actions in accordance with the terms and provisions of this Stipulation as set forth below.

NOW, THEREFORE, IT IS STIPULATED AND AGREED, subject to the approval of this Court, pursuant to Rule 23 of the Court of Chancery Rules, by and between defendants hereto and the plaintiffs for themselves and for the Settlement Class (defined below), that all claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, and any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class, whether directly, derivatively, representatively or in any other capacity, against any of the named defendants in the Delaware Actions (regardless of whether such defendant has been served or entered an appearance in any of

the actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lenders, investment bankers, representatives, trustees, affiliates, associates, parents, subsidiaries, general and limited partners and partnerships, heirs, executors, administrators, successors, and assigns including without limitation Lazard (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc. (advisor to Matsushita) or against anyone else (collectively, the "Released Persons") in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences referred to in the December 4, 1990, Claim Letter and the Amended Complaint in the Delaware Actions or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action (all of which are hereinafter collectively referred to as the "Settled Claims"), shall be compromised, settled, released and discharged with prejudice, upon and subject to the following terms and conditions:

1. In consideration for the full settlement, satisfaction and compromise of the Settled Claims, as defined above, subject to the terms and conditions hereof, defendants agree to deposit $2.0 million (plus interest as described below) in a settlement fund (the "Settlement Fund") to be paid pro rata to those members of the Settlement Class whose shares of MCA stock were purchased pursuant to the Tender Offer or were cashed out or converted pursuant to the Merger, as reflected on the records of such payments, said monies to be deposited at such time as the Settlement shall become final in accordance with its terms; provided however, that any amounts awarded by the Court for plaintiffs' attorneys' fees and/or disbursements shall be paid out of such Settlement Fund prior to distribution of said funds. Beginning on the next business

day after the Order and Final Judgment is entered by the Court of Chancery, the Settlement Fund shall accrue interest at a compound rate of 3% per annum and continue to accrue interest at such rate until the Settlement Fund is fully and finally distributed pursuant to the terms herein.

2. For purposes of settlement only, the Delaware Actions, as consolidated, shall be maintained and proceed as a class action, pursuant to Chancery Court Rules 23(a) and (b)(3), on behalf of a class of persons as defined in paragraph 4(a) of this Stipulation.

3. The obligations of the defendants under this Stipulation shall be in full settlement, compromise, release and discharge of the Settled Claims and each of them. Upon approval of the Settlement provided for in this Stipulation by the Court and consummation of defendants' obligations hereunder, the defendants, the Released Persons or any of them shall have no other or further liability or obligation to anyone with respect to the Settled Claims, except as expressly provided herein.

4. As soon as practicable after this Stipulation has been executed, the parties shall jointly move the Court for approval of the Settlement. The parties shall apply jointly for an Order, in the form annexed hereto as Exhibit A (the "Order"), providing, among other things:

(a) that for purposes of settlement only, the Delaware Actions shall be maintained and proceed as a class action, pursuant to Chancery Court Rules 23(a) and (b)(3), on behalf of a class consisting of all holders of MCA common stock on and after September 25, 1990, and their successors in interest, immediate or remote, through and including effectuation of the Merger on January 3, 1991 (excluding defendants and their immediate families and any person who has validly requested exclusion in accordance with the procedures set forth in paragraph 6 of this Stipulation) (hereinafter the "Settlement Class" and the "Class Period");

(b) that (i) the Notice of Pendency of Class Actions, Class Action Determination, Proposed Settlement of Class Actions,

Settlement Hearing, and Right to Appear, in the form annexed hereto as Exhibit B (the "Notice"); and (ii) the Summary Notice of Class Action Determination, Proposed Settlement of Class Actions and Settlement Hearing in the form annexed hereto as Exhibit C (the "Summary Notice"), are approved by the Court, and that the mailing and publication of the Notice substantially in the manner and form set forth in the Order and the publication of the Summary Notice in the manner and form set forth in the Order meet the requirements of Court of Chancery Rule 23 and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto; and

(c) that a hearing (the "Settlement Hearing") shall be held before the Court, at a time and date to be set by the Court, to determine whether the proposed settlement of the Delaware Actions on the terms and conditions set forth in the Stipulation is fair, reasonable and adequate and should be approved by the Court, and whether a judgment should be entered, and to consider the application of counsel for the Settlement Class for an award of fees and reimbursement of expenses.

5. If the Settlement (including any modification thereto made with the consent of the parties as provided for herein), shall be approved by the Court following a hearing, the parties shall jointly request the Court to enter an Order and Final Judgment ("Final Order"), substantially in the form annexed hereto as Exhibit D, among other things:

(a) approving the Settlement as fair, reasonable and adequate and directing consummation of the Settlement in accordance with its terms and provisions;

(b) dismissing the Delaware Actions as to all defendants in the Delaware Actions with prejudice as against all plaintiffs and all members of the Settlement Class, without costs except as hereinafter provided, such dismissal to be subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of the Court with reference to the Stipulation;

(c) permanently barring and enjoining the institution or prosecution by plaintiffs or any member of the Settlement Class, either directly or in any other capacity, of any action asserting claims which are Settled Claims as heretofore defined;

(d) releasing and discharging, on behalf of the Settlement Class and the plaintiffs, the Released Persons from all Settled Claims; and

(e) awarding attorneys' fees and expenses to plaintiffs' counsel, or reserving jurisdiction with respect thereto.

6. (a) Requests for Exclusion from the Settlement Class shall list the name, address and social security number *or* taxpayer identification number of the person seeking exclusion, and the amount of all MCA common stock owned by such person during the Class Period;

(b) If a Request for Exclusion does not include all of the foregoing information, it shall not be a valid Request for Exclusion and the person or entity filing an invalid Request for Exclusion shall be a member of the Settlement Class. All persons who properly file Requests for Exclusion from the Settlement Class shall not be members of the Settlement Class and shall have no rights with respect to the Settlement and no interest in the Settlement Fund.

(c) Each potential Settlement Class member who does not submit a properly completed Request for Exclusion no later than twenty (20) days prior to the Settlement Hearing shall be included in the Settlement Class. For purposes of determining timeliness, a Request for Exclusion shall be deemed to have been submitted when posted, if a postmark is indicated on the envelope and it is mailed, postage prepaid and addressed in accordance with the instructions in said Notice. The original Requests for Exclusion shall be filed by mailing to the P.O. Box address referred to in the Notice.

7. The approval by the Court of the Settlement proposed by the Stipulation shall be considered final for purposes of this Stipulation either (a) upon the entry by the Court of the Final

Order and when the applicable period for the appeal of such Final Order shall have expired without an appeal having been filed; or (b) if an appeal is taken, upon entry of an order affirming the Final Order and when the applicable period for the appeal of such affirmance of the Final Order shall have expired without an appeal having been filed, or upon entry of any Stipulation dismissing any such appeal with no right of further prosecution of the appeal; or (c) if an appeal is taken from any decision of the Delaware Supreme Court upon entry of an order in such appeal finally affirming the Final Order without right of further appeal or upon entry of any Stipulation dismissing any such appeal with no right of further prosecution of the appeal.

8. (a) Provided that Court approval of the Settlement has been obtained, plaintiffs' counsel in the Delaware Actions will jointly apply to this Court for an award of attorneys' fees, plus reimbursement of expenses. Plaintiffs' counsel also intend to apply to the Court for provision that any award of fees and disbursements with respect to such fee application shall accrue interest at the same interest rate earned on the Settlement Fund, as provided for in paragraph 1 herein, from the date the Court approves such award through and including the date of payment. Defendants shall not oppose either of such applications. Plaintiffs' counsels' application for attorneys' fees and expenses may be made, at the option of plaintiffs' counsel, at or subsequent to the Settlement Hearing referred to in paragraph 4(c) hereof. Any attorneys' fees and expenses so awarded by the Court to plaintiffs' counsel shall not be payable unless and until the Final Order shall become final, as provided in paragraph 8 hereof. Any attorneys' fees and expenses awarded by the Court to plaintiffs' counsel shall be paid out of the Settlement Fund to Milberg Weiss Bershad Specthrie & Lerach (in escrow for plaintiffs' counsel in the Delaware Actions) or as the Court may otherwise direct, within ten (10) business days after the Settlement shall become final in accordance with its terms.

(b) Defendants will pay the costs of the Notice and settlement administration provided for by the Order referred to in

paragraph 4(b) hereof. Plaintiffs and their counsel shall have no responsibility for any such costs regardless of whether the Settlement is consummated. Except as provided in this Stipulation, the defendants shall bear no other expenses, costs, damages or fees incurred by any named plaintiffs, by any member of the Settlement Class, or by any of their attorneys, experts, advisors, agents or representatives.

9. The parties shall have the option to withdraw from the Settlement in the event that: (a) the Orders as provided in paragraphs 4 and 5 hereof are not entered substantially in the form specified therein, including such modifications thereto as may be ordered by the Court with the consent of the parties; (b) the Settlement is not approved by the Court; or (c) such order is reversed or substantially modified upon appeal. In addition, defendants shall have the option to withdraw from the Settlement no later than three days before the Settlement Hearing in the event that valid Requests for Exclusion are received from persons who collectively held in excess of that number of MCA common shares which plaintiffs and defendants have agreed upon (which number shall be kept confidential by the parties). In the event any party to the Settlement exercises such option to withdraw, a written notice of such withdrawal and the grounds therefor shall be promptly delivered to all signatories to this Stipulation. As a result of any such withdrawal, this Stipulation, the Settlement proposed herein (including any modification thereto made with the consent of the parties as provided for herein) and any action taken or to be taken in connection therewith shall be terminated and shall become void and have no further force and effect except for the obligation of defendants to pay for any expense incurred in connection with the Notice and administration of the Settlement.

10. In the event that the Settlement as provided for in this Stipulation is not finally approved by the Court, or does not become effective for any reason other than the failure of any settling party to perform such party's obligations hereunder, then the Stipulation shall become null and void and of no further force and effect, and all negotiations, proceedings, and

statements relating thereto shall be without prejudice as to the rights of any and all parties hereto and their respective predecessors and successors, and all parties and their respective predecessors and successors shall be restored to their respective positions existing at the date of the Stipulation.

11. This Stipulation and all negotiations, statements and proceedings in connection therewith shall not in any event be construed as, or deemed to be evidence of, an admission or concession on the part of the Settling Defendants, of any liability of or wrongdoing by them, or any of them, and shall not be offered or received in evidence in any action or proceeding, or used in any way as an admission, concession or evidence of any liability or wrongdoing of any nature on the part of the Settling Defendants, and shall not be construed as or deemed to be evidence of, an admission or concession that the plaintiffs or any member of the Settlement Class have suffered any damage; and shall not be construed as, or deemed to be evidence of, an admission or concession on the part of the plaintiffs or any member of the Settlement Class that any of their claims asserted in the Delaware Actions are without merit or that damages recoverable in the Delaware Actions are without merit or that damages recoverable in the Delaware Actions do not exceed the aggregate of the amounts payable pursuant to this Stipulation.

12. Each of the attorneys executing this Stipulation on behalf of one or more parties hereto warrants and represents that he or she has been duly authorized and empowered to execute this Stipulation on behalf of each such respective party.

13. Without further Order of the Court, the parties may agree to reasonable extensions of time to carry out any of the provisions of this Stipulation.

14. This Stipulation, including all Exhibits annexed hereto, constitutes the entire agreement among the parties with regard to the subject matter thereof. This Stipulation may not be modified or amended except in writing signed by all signatories hereto or their successors in interest.

15. This Stipulation upon becoming operative shall be binding upon and inure to the benefit of the settling parties hereto and their respective heirs, executors, administrators, successors and assigns and upon any corporation, partnership or other entity into or with which any settling party hereto may merge or consolidate.

16. This Stipulation may be executed in any number of actual or telecopied counterparts and by the different settling parties hereto on separate counterparts, each of which when so executed and delivered shall be an original. The executed signature page(s) from each actual or telecopied counterpart may be joined together and attached to one such original and shall constitute one and the same instrument.

17. The waiver by any party of any breach of this Stipulation shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Stipulation.

18. This Stipulation shall be construed and enforced in accordance with the laws of the State of Delaware.

Dated: Wilmington, Delaware
October 22, 1992

ROSENTHAL, MONHAIT GROSS & GODDESS, P.A.
First Federal Plaza
Wilmington, DE 19801

By: /s/
Liaison Counsel for Settling Plaintiffs

Of Counsel:

MILBERG WEISS BERSHAD SPECTHRIE & LERACH

One Pennsylvania Plaza
New York, New York 10119

- and -

ABBEY & ELLIS
212 East 39th Street
New York, New York 10016

- and -

BERGER & MONTAGUE
1622 Locust Street
Philadelphia, PA 19103

- and -

WOLF, POPPER, ROSS, WOLF & JONES
845 Third Avenue
New York, New York 10022

Plaintiffs' Lead Counsel

Of Counsel:

WACHTELL, LIPTON, ROSEN & KATZ
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MORRIS NICHOLS, ARSHT & TUNNELL
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

By: /s/
Attorneys for Defendant MCA INC. and the Individual Defendants

Of Counsel:

SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)

RICHARDS, LAYTON & FINGER
One Rodney Square
P.O. Box 551
Wilmington, DE 19899

By: /s/
Attorneys for Defendant Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corp., and Matsushita Acquisition Corp.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

---x

IN RE MCA INC. SHAREHOLDERS LITIGATION	:	CONSOLIDATED C.A. NO. 11740

---x

HEARING ORDER

The parties to the consolidated actions (the "Actions") having made application pursuant to Rule 23(e) of the Rules of the Court of Chancery, for an Order approving the proposed settlement of the Actions (the "Settlement") in accordance with a Stipulation of Settlement filed with the Court (the "Stipulation"), which, together with the accompanying documents, sets forth the terms and conditions for the proposed settlement of the Actions and for the dismissal of the Actions with prejudice upon the terms and conditions set forth in the Stipulation; and the Court having read and considered the Stipulation and accompanying documents; and all parties having consented to the entry of this Order:

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Actions shall, for the purposes of the Settlement only, be maintained and proceed as a consolidated class action with the named plaintiffs in the Actions as class representatives, pursuant to Court of Chancery Rules 23(a) and 23(b)(3), on behalf of the following class (the "Settlement Class" and the "Class Period"): all holders of the common stock of MCA INC. ("MCA"), on or after September 25, 1990, through and including effectuation of the Merger (as defined in ¶ D(i) of the Stipulation) on January 3, 1991, and their successors in interest, immediate or remote (excluding defendants and member of their immediate families). The Court determines, for purposes of the Settlement only, that the requirements of Court of Chancery Rules 23(a) and 23(b)(3) are satisfied.

2. A hearing (the "Settlement Hearing") shall be held before the Court on January 21, 1993, at 12:00 noon in the Court of Chancery, Public Building, 11th and King Streets, Wilmington, Delaware 19801: (a) to determine whether the proposed Settlement of the Actions on the terms and conditions provided for in the Stipulation is fair, reasonable and adequate and should be approved by the Court, and whether a judgment as provided in paragraph 5 of the Stipulation should be entered thereon; and (b) to consider the application of plaintiffs' counsel in the Actions for an award of fees and expenses. The Court may adjourn the Hearing, or any adjournment thereof, without further notice to members of the Settlement Class other than by announcement at the Hearing or any adjournment thereof.

3. The Court approves, in form, the Notice of Pendency of Class Actions, Class Action Determination, Proposed Settlement of Class Actions, Settlement Hearing, Right to Request Exclusion and Right to Appear (the "Notice"), attached as Exhibit B to the Stipulation, and the Summary Notice of Class Action Determination, Proposed Settlement of Class Actions and Settlement Hearing (the "Summary Notice"), attached as Exhibit C to the Stipulation, and finds that the mailing of the Notice and the publication of the Summary Notice in substantially the manner and form set forth in paragraph 4 of this Order meets the requirements of Court of Chancery Rule 23 and due process, is the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto.

4. (a) Within 14 days of this Order, defendants shall cause a copy of the Notice to be mailed by first class mail to all persons and entities appearing on the Company's transfer records as record holders of the common stock of the Company as of the close of business between September 25, 1990, and December 28, 1990 (the last trading day prior to the effectuation of the Merger on January 3, 1991), both dates inclusive. Defendants shall also use reasonable efforts to give notice to the beneficial owners of the Company's common stock who were such owners on or after September 25, 1990, and their

successors in interest, immediate or remote, by making additional copies of the Notice available to any record holder requesting same for the purpose of distribution to such beneficial owners. Defendants shall offer to pay the reasonable costs of nominees incurred in compiling a list of the names and addresses of said beneficial owners and/or forwarding copies of the Notice to them.

(b) The Summary Notice, substantially in the form annexed to the Stipulation as Exhibit C shall be published in the national edition of the *Wall Street Journal* within ten days of the mailing of the Notice.

(c) At or prior to the Settlement Hearing provided for in paragraph 2 of this Order, defendants shall file proof, by affidavit, of such publication and mailings.

5. Any member of the Settlement Class who has not requested exclusion from the Settlement Class may appear personally at the Settlement Hearing or by counsel, provided that an appearance is served and filed as hereinafter provided, and show cause, if any, why the Settlement of the Actions should not be approved as fair, reasonable, and adequate, why judgment should not be entered dismissing with prejudice all claims of all plaintiffs and all members of the Settlement Class against any or all defendants (and related entities, including affiliates), or why the Court should not grant an allowance of reasonable fees and expenses to plaintiffs' counsel for their services herein and actual expenses incurred. However, unless the Court otherwise directs, no member of the Settlement Class, or any person (excluding a party), shall be heard or shall be entitled to contest the approval of the terms and conditions of the Settlement or (if approved) the judgment to be entered thereon, or the allowance of fees and expenses to plaintiffs' counsel, and no papers or briefs submitted by any member of the Settlement Class or any other person (excluding a party) shall be received and considered, except by Order of the Court for good cause shown, unless, no later than twenty (20) days prior to the Settlement Hearing, the following documents are served and filed in the

manner provided below: (a) a notice of intention to appear; (b) a detailed statement of such person's specific objections to any matter before the Court; (c) proof of membership in the Settlement Class; and (d) the grounds for such objections and any reasons why such person desires to appear and to be heard, as well as all documents and writings which such person desires this Court to consider. Such documents shall be served upon the following counsel prior to filing such documents with the Court, and then filed with the Register in Chancery, Court of Chancery, Public Building, 11th and King Streets, Wilmington, Delaware 19801:

Joseph A. Rosenthal, Esq.
ROSENTHAL, MONHAIT, GROSS
& GODDESS, P.A.
First Federal Plaza
P.O. Box 1070
Wilmington, Delaware 19899

On Behalf of All Plaintiffs

Martin P. Tully, Esq.
MORRIS, NICHOLS, ARSHT &
TUNNELL
1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 10900

On Behalf Of Defendant MCA Inc.
And The Individual Defendants

-and-

R. Franklin Balotti, Esq.
RICHARDS, LAYTON & FINGER
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899

On Behalf Of Defendants Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corp. Matsushita Acquisition Corp.

Any person who fails to object in the manner provided herein shall be deemed to have waived his, her or its objections and shall forever be barred from making any such objections in these Actions or in any other action or proceeding.

6. All members of the Settlement Class have the option of excluding themselves from the Settlement Class by mailing a timely and valid Request for Exclusion postmarked not later than twenty (20) days prior to the Settlement Hearing addressed to In Re MCA INC. Shareholders Litigation, P.O. Box 92, Wilmington, DE 19899. A Request for Exclusion must set forth the following information with respect to the person or entity requesting exclusion: name, address, social security number or taxpayer identification number, the amount of all MCA common stock owned by such person or entity during the Class Period (i.e., the number of shares held or purchased on September 25, 1990 to January 3, 1991, the date of each purchase or sale (if any) during such period and the number of shares in any such transaction). All Requests for Exclusion must be signed by or on behalf of the person or entity so requesting exclusion.

7. If a Request for Exclusion does not include all of the foregoing information, it shall not be a valid Request for Exclusion and the person or entity filing an invalid Request for Exclusion shall be a member of the Settlement Class. All persons who properly file Requests for Exclusion from the Settlement Class shall not be members of the Settlement Class

and shall have no rights with respect to the Settlement and no interest in the Settlement Fund.

/s/

Vice Chancellor

October 27, 1992

IN THE COURT OF CHANCERY OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE MCA INC. SHAREHOLDERS LITIGATION	:	CONSOLIDATED
	:	C.A. No. 11740

ORDER AND FINAL JUDGMENT

On this 22 day of February, 1993 a hearing having been held before this Court to determine whether the terms of the Stipulation of Settlement dated October 22, 1992 (the "Stipulation"), and the terms and conditions of the settlement proposed in the Stipulation (the "Settlement"), and all transactions referred to therein or preparatory or incident thereto, are fair, reasonable and adequate for the settlement of all claims asserted herein; and whether judgment should be entered in these civil actions (the "Actions") dismissing the Actions on the merits with prejudice as against all of the plaintiffs and all members of the Settlement Class certified in this Court's Order dated October 27, 1992; and the Court having considered all matters submitted to it at the hearing and otherwise and the Court having rendered its Memorandum Opinion dated February 12, 1993 approving the Settlement and awarding attorneys' fees and expenses:

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Notice and Summary Notice (as defined in ¶ 4(b) of the Stipulation), is hereby determined to have been the best practicable notice under the circumstances and in full compliance with Rule 23 of the Court of Chancery and the requirements of due process and it is hereby further determined that the plaintiffs in the Actions, as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class and that the maintenance of this action

as a class action meets all the requirements of Rule 23(a) and (b)(3) of the Court of Chancery.

2. The Stipulation and the Settlement are approved as fair, reasonable and adequate and in the best interests of the plaintiffs and the Settlement Class, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation, provided that any additional Requests for Exclusion received after the deadline set in paragraph 6 of the Hearing Order dated October 7, 1992 but prior to February 12, 1993 will be effective.

3. (a) The Actions are hereby dismissed with prejudice on the merits as to all defendants in the Actions (regardless of whether any such defendant has been served or entered an appearance in any of the Actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lenders, investment bankers, representatives, trustees, affiliates, associates, parents, subsidiaries, general and limited partnerships, heirs, executors, administrators, successors and assigns (including Lazard Freres & Co. (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc. (advisor to Matsushita)) (collectively, the "Released Persons"), as against plaintiffs and all members of the Settlement Class (other than those who have validly requested exclusion therefrom) and their successors and assigns, whether known or unknown, whether directly or in any other capacity, without costs except as provided in the Stipulation, such dismissal to be subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of this Court with reference to the Stipulation.

(b) All claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class (other than those who have validly requested exclusion therefrom),

whether directly, derivatively, representatively or in any other capacity, against any of the Released Persons or against anyone else in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences referred to in the December 4, 1990 Claim Letter and the Amended Complaint in the Action, or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions, the Second *Minton* Action and the Second *Epstein* Action (all as defined in the Stipulation) (all of which are hereinafter collectively referred to as the "Settled Claims") are hereby compromised, settled, released and discharged with prejudice by virtue of the proceedings herein and this Order and Final Judgment.

4. The plaintiffs and all members of the Settlement Class (other than those who have validly requested exclusion therefrom), their successors and assigns, whether acting directly, derivatively, representatively or in any other capacity, are hereby permanently barred and enjoined from instituting or prosecuting any other action in any court of this or any other jurisdiction based upon, relating to, or for the purpose of enforcing any of the Settled Claims.

5. Plaintiffs' attorneys of record herein are hereby awarded the sum of $250,000 in fees and reimbursement of expenses in connection with the Actions, which sum the Court finds to be fair and reasonable and which shall be paid to plaintiffs' attorneys according to the terms set forth in the Stipulation. Said sum shall accrue interest and be paid in accordance with paragraph 8 of the Stipulation.

/s/

Vice Chancellor

Nos. 92-55675, 92-55632, 92-55288

In The
United States Court of Appeals
FOR THE NINTH CIRCUIT

LAWRENCE EPSTEIN, *et al.*,

Plaintiffs-Appellants,

v.

MCA INC., *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV-90-6451-R
HONORABLE MANUAL REAL

PLAINTIFFS-APPELLANTS' DECLARATION TRANSMITTING DELAWARE DOCUMENTS RELEVANT TO COURT'S ORDER FOR FURTHER BRIEFING

HENRY PAUL MONAGHAN
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IRVING MALCHMAN
Roger W. Kirby
KAUFMAN MALCHMAN KIRBY & SQUIRE
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Nos. 92-55675, 92-55632, 92-55288

In The United States Court of Appeals
FOR THE NINTH CIRCUIT

LAWRENCE EPSTEIN, et al.,

Plaintiffs-Appellants,

v.

MCA INC., et al.,

Defendants-Appellees.

On Appeal From the United States
Court For the Central District of California

DECLARATION OF HENRY P. MONAGHAN TRANSMITTING DELAWARE DOCUMENTS RELEVANT TO COURT'S ORDER FOR FURTHER BRIEFING

I, HENRY P. MONAGHAN, declare:

1. I am an attorney duly admitted to practice before this Court. I am co-counsel for the Epstein appellants herein. I submit this declaration in support of plaintiffs-appellants' brief on preclusion.

2. Attached to this declaration are a true and correct copy of:

a. The shareholders' class action complaint in *Lazar et al. v. MCA Inc. et al.*, Civil Action No. 11740, dated September 26, 1990 (Exhibit A).

b. A letter dated December 4, 1990 from Steven Schulman and David Bershad to Herbert M. Wachtell (Exhibit B).

c. The amended stockholders' class action complaint in *In re MCA Inc. Shareholders Litigation*, dated December 14, 1990 (Exhibit C).

d. The notice to the class in the Delaware action, dated December 18, 1990 (Exhibit D).

e. Reporter's transcript of hearing before the Delaware chancery court on January 30, 1991 (Exhibit E).

f. The Delaware chancery court's memorandum opinion in *In re MCA Inc. Shareholders Litigation*, 598 A.2d 687 (Del. Ch. April 22, 1991) (Exhibit F);

g. A stipulation and agreement of compromise and settlement in the Delaware action, dated October 22, 1992 (Exhibit G).

h. The notice to the class in the Delaware action, dated October 27, 1992 (Exhibit H).

i. Reporter's transcript of hearing before the Delaware chancery court on January 21, 1993 (Exhibit I).

j. The Delaware chancery court's memorandum opinion in *In re MCA Inc. Shareholders Litigation*, 1993 WL 4324 (Del. Ch. Feb. 16, 1993) (Exhibit J).

k. Notice of appeal in the Delaware action, dated March 25, 1992 (Exhibit K).

l. The docket sheet in the Delaware action, as of August 18, 1993 (Exhibit L).

m. An article by John C. Coffee, Jr., entitled *Suspect Settlements in Securities Litigation*, New York Law Journal, Page 5, Col. 1, dated March 28, 1991 (Exhibit M).

n. The Delaware plaintiffs' memorandum in support of proposed settlement in *In re MCA Inc. Shareholders Litigation*, dated January 19, 1993 (Exhibit N).

o. Affidavit of Roger W. Kirby in support of plaintiffs' motion for summary judgment and concerning a possible Delaware release (without exhibits), dated December 14, 1990 (Exhibit O).

I declare that the foregoing is true and correct under the pains and penalties of perjury.

/s/

HENRY P. MONAGHAN

Dated: New York, New York
August 30, 1993

MILBERG WEISS BERSHAD SPECHTRIE & LERACH

[Remainder of Letterhead Omitted]

December 4, 1990

VIA TELECOPY & BY HAND DELIVERY

Herbert M. Wachtell, Esq.
Wachtell, Lipton, Rosen & Katz
299 Park Avenue
New York, New York 10171

Re: In re MCA Inc. Shareholders Litigation,
Consol. C.A. No. 11740 (Del. Ch.)

Dear Mr. Wachtell:

This will summarize the principal grounds on which plaintiffs intend to rely in seeking preliminary injunctive relief. The nature of the relief sought will also be described. By agreement with you, this letter will substitute for the filing of an amended and/or supplemental complaint by Tuesday, December 4, 1990. Plaintiffs have not yet received all documents requested from the parties and non-party witnesses and have not yet taken any depositions. Therefore, plaintiffs reserve the right to modify and/or supplement the following summary as the discovery proceeds and briefing on the motion is conducted. In addition, plaintiffs further reserve the right to modify and/or supplement their legal analysis as the facts develop.

To begin with, plaintiffs will argue that defendants have breached their fiduciary duties of complete candor in connection with the tender offer materials issued by both MCA and Matsushita with respect to the tender offer. MCA has distributed the Offer to Purchase to its shareholders together with the Schedule 14D-9 Solicitation/Recommendation Statement and Matsushita has the right under Section 4.06 of the Merger Agreement to "review and comment" upon disclosure materials of MCA in connection with the transaction. Therefore, plaintiffs allege that both Matsushita and MCA are jointly

responsible for the inadequate disclosures provided to MCA shareholders in connection with the transaction.

Plaintiffs further contend that the management arrangements regarding benefits and compensation are deceptively presented in the disclosure materials. For example, Mr. Sheinberg and other members of senior management who occupy seats on the Board of Directors or exercise substantial responsibilities in managing and supervising MCA are to be provided with immense cash bonuses in connection with the acquisition in addition to receiving enormous increases in their basic compensation. These massive payments are presented as substantially equivalent to the incentive compensation that these officers/directors otherwise would have received in the ordinary course and are also presented as having been insisted upon by Matsushita as a means of assuring management continuity. Plaintiffs allege and will seek to demonstrate that the bonuses are far greater than their recipients could have expected to receive in the ordinary course and that management insisted upon such benefits as the price of its willingness to negotiate with Matsushita. Plaintiffs will also seek to demonstrate that Matsushita willingly agreed to pay and may well have encouraged the payment of such compensation because of its expectation that this would vastly limit the independence of senior management and the Board of Directors in negotiating with Matsushita and thereby save the purchaser potentially hundreds of millions or billions of dollars in acquisition costs that a fully disinterested MCA Board would have insisted upon. The portrayal of the management benefits as consistent with ordinary practice and as proceeding from the wishes of the purchaser to secure the services of the present officers and directors is materially false and deceptive and calculated to present a neutral or positive impression of special arrangements which create serious conflicts of interest that the parties have attempted to conceal.

Plaintiffs also contend and will seek to demonstrate that Mr. Wasserman's planned equity participation in "Holdings" following completion of the acquisition establishes that the parties are engaged in a form of "going-private" transaction

subject to the disclosure requirements of Rule 13e-3 of the Exchange Act. However, the parties have not made the required filings with the SEC which would be made were they proceeding in accordance with Rule 13e-3. In particular, the Lazard Freres investment banker's "book" has not been made publicly available as would otherwise be the case were the parties proceeding in accordance with the requirements for a going-private transaction. Material information regarding the fairness and adequacy of the proposed transaction has consequently been withheld from the investing public. Plaintiffs will argue that the Delaware duties of complete candor incorporate the requirement to make available in connection with a "going-private" transaction the materials required by Rule 13e-3.

Plaintiffs further contend that the defendants have misleadingly concealed their intention to retain effective control over WWOR-TV following the spinoff and prevent the emergence of market forces which could generate a sale of this division at a price representing genuinely maximum value for the shareholders. Although the tender offer materials appear to suggest that the television station will be open to bidders, the provision for a board of directors following the spinoff which will be dominated by members of MCA senior management and the planned implementation of a shareholder rights plan or "poison pill" in a form satisfactory to MCA and Matsushita have both the purpose and effect of entrenching in the control of WWOR-TV the MCA designees whom defendants actually seek to protect from any challenge to their control following the Matsushita takeover. The offering materials deceptively conceal these facts which are contrary to the fundamental obligation of the defendants to seek and arrange the best possible transaction in connection with the change in control.

Plaintiffs also contend that the shareholders are being denied significant and material information regarding the operating segments of MCA which has been provided to the purchaser but has not been shared with the stockholders on an equivalent basis. The offering materials claim that this information would not be "material" to shareholders but this is

simply a self-serving assertion which itself is false and misleading in view of the obvious importance of this information to shareholders seeking to make a reasoned election between accepting the purported benefits of the tender offer or a statutory appraisal proceeding.

Finally, plaintiffs contend that the tender offer materials are seriously deficient in their failure to disclose prior market contacts between MCA and other potential purchasers which would indicate the level of market interest MCA could command in an open and effective auction. Plaintiffs believe and will seek to demonstrate that other potential purchasers were rebuffed when they refused to provide the management benefits and other concessions to management to which Matsushita has acceded. Knowledge of those prior market contacts would, therefore, materially assist the shareholders in assessing the fairness and adequacy of the current proposal and in appreciating the significant extent to which conflicts of interest or potential conflicts have impeded the success of prior bids or expressions of interest. Shareholders are similarly entitled to be informed of other possible alternatives which could have been explored but were not.

Plaintiffs further contend that the proposed transaction violates defendants' fundamental duties enunciated in *Revlon*. Under *Revlon* the MCA directors must act with the single objective of obtaining the highest possible price in connection with the sale of the corporation. The Court will find a violation of *Revlon* if the record demonstrates that the directors have not acted reasonably to attain this goal. *See Roberts v. General Instrument Corp.*, Del. Ch., CA. No. 11639, Allen, C. (Aug. 13, 1990).

While the burden is ordinarily upon the plaintiff to demonstrate that the directors have failed to act reasonably to attain this goal, the burden of proof must shift in this case because more than a majority of the directors have financial or other conflicting interests in the success of the transaction. Senior management are eligible to receive bonus and compensation payments immensely greater than they would otherwise

receive under their present contracts. Mr. Wasserman has negotiated a very favorable arrangement in connection with the sale which will insulate him from costly capital gains taxes. Mr. Strauss lacks independence because of the dual representation by his law firm of Matsushita and MCA and in fact abstained from voting on the transaction. Mr. Baker similarly lacks independence because of the substantial payments made to his law firm in connection with the transaction. In addition, Lazard's "fairness" opinion is unreliable because of the agreement which Lazard has arranged by which Lazard receives multi-million dollar advisory fees contingent upon the completion of the acquisition transaction. Mr. Rohatyn cannot claim any objectivity with respect to his support for the transaction because of the multi-million dollar fees which Lazard will receive in the event that a sale is consummated. The remaining directors who apparently have no financial stake in the transaction constitute a minority of the MCA Board.

Therefore, the defendants unquestionably bear the burden of demonstrating the fairness and adequacy of the transaction under the enhanced requirements imposed by *Revlon*. Plaintiffs submit that defendants will be unable to satisfy this burden. Their failure to form a special committee charged with negotiating and approving the transaction has denied the corporation and its shareholders of any truly independent representation in connection with the formulation of the terms of the merger. The directors have also failed to engage in a sufficient "market check" necessary to assure the fairness and adequacy of the merger terms. Since the commencement of discussions and negotiations with Matsushita in or about September 1990, MCA has been prevented from soliciting any competitive expressions of interest or purchase proposals. In addition, the parties have clearly rejected any post-agreement "market check" by virtue of their refusal to extend the tender offer beyond the minimum required under federal regulations and their agreement to a stock lock-up and break-up fees and expense reimbursement among other restraints which prevent any genuine auction from developing. MCA remains prohibited from soliciting competitive expressions of interest and while MCA may respond to any

competitive proposals which are made, the limited time available and obvious allegiances of management and the Board of Directors must inevitably discourage genuine competitive bids from emerging.

Certain other aspects of the transaction confirm the fundamental failure of the MCA directors to obtain the best possible transaction unaffected by conflicts of interest. In order to facilitate the transaction with Matsushita, they have arranged to spinoff the WWOR-TV subsidiary to stockholders rather than investing the additional time and effort necessary to auction this subsidiary at the highest possible price and thereby generate maximum proceeds for the shareholders. In addition, the merger documents contemplate that the spinoff corporation will adopt a "poison pill" in form acceptable to Matsushita and MCA. If this subsidiary were genuinely to be independent, it would be unnecessary to incorporate such provision in the agreements. It can only be concluded that the implementation of the poison pill under these circumstances is intended to prevent the emergence of an open and effective auction for the television station and to assure that those persons chosen by the principals to manage the station will confront no challenge to their control.

Again, because of political sensitivities, the MCA directors have agreed to an arrangement whereby the Yosemite subsidiary will be marketed at some later time and its earnings prior to sale will be placed in escrow for the benefit of the National Park Service. While such charitable objectives are often to be lauded, in this case the escrowing of the Yosemite profits for an indeterminate period is clearly calculated to assuage public sentiment concerning the transaction and allow the principals to achieve their personal agenda in consummating the sale under the terms agreed. A sale to another purchaser may not engender such public sensitivities and under those circumstances the Yosemite proceeds and the value of that subsidiary would unquestionably be reserved for the shareholders.

Thus, the company has failed to engage in the probing of the market which is necessary to assure the fairness and adequacy of the merger terms and has instead negotiated on a preferential basis with Matsushita without the auction or other open bidding procedure best calculated to achieve maximum value in connection with the sale of control. As a result, the defendants cannot meet their burden of demonstrating that they have satisfied their fiduciary obligations to arrange the best possible transaction under the circumstances and avoid or eliminate conflicts or potential conflicts of interest which may detract from achieving this objective.

Lastly, plaintiffs contend and will seek to demonstrate that Mr. Wasserman has impermissibly negotiated preferential arrangements in connection with the transaction by which he will exchange stock for stock and avoid costly capital gains taxes to which all other stockholders are subject. Plaintiffs will seek to show that Mr. Wasserman's negotiation of and agreement to such preferential provisions violated his fiduciary duty of loyalty and that the conflicted Board could not and did not properly ratify the transaction.

Consequently, it is the position of plaintiffs that the present transaction fails to meet the requirements of Delaware law both with respect to the disclosures made in attempting to induce the tender of shares and the actions and omissions of the directors in attempting to sell the corporation under circumstances which amount to an abdication of their responsibilities to seek the maximization of shareholder value and fulfill the best interests of the shareholders.

As relief, plaintiffs will seek an interim delay in the closing of the tender offer and the issuance of corrective disclosures intended to cure the deficiencies identified above. In addition, plaintiffs will seek an extension of the tender offer and the implementation of corporate mechanisms which will assure that the sale process is controlled by fully independent and objective directors or other representatives of the corporate and shareholder interests who will act strictly in the interests of maximizing shareholder value and assuring that all

appropriate alternatives have been explored prior to consummating the sale transaction. Among other things, plaintiffs will seek the selection of a truly independent special committee untainted by the conflicts of interest identified above and will also seek the removal of the impediments to fair and open bidding, such as the stock lock-up and break-up fees and expense reimbursement and no-shopping pledges contained in the present agreement, which are hindering the bidding process from emerging.

Very truly yours,

MILBERG WEISS BERSHAD
SPECTHRIE & LERACH

By: /s/

David J. Bershad
Steven G. Schulman

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1622 Locust Street
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845 Third Avenue
New York, New York 10022

cc: Barry Ostrager, Esq. (via telecopy)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

IN RE MCA, INC.	)	Consolidated
SHAREHOLDERS LITIGATION	)	C. A. No. 11740

Courtroom No. 107
Public Building
Wilmington, Delaware
Wednesday,
January 30, 1991,
11:00 A. M.

BEFORE:

HON. MAURICE A. HARTNETT, III, Vice Chancellor.

SETTLEMENT HEARING

[2] APPEARANCES:

JOSEPH A. ROSENTHAL, ESQ.,
Morris, Rosenthal, Monhait & Gross, P. A.
-and-
STEVEN G. SCHULMAN, ESQ.,
(New York Bar)
Milberg Weiss Bershad Specthrie & Lerach
-and-
STANLEY R. WOLFE, ESQ.,
(Pennsylvania Bar)
Berger & Montague
-and-
MARK C. GARDY, ESQ.,
(New York Bar)
Abbey & Ellis

For the Plaintiff.

A. GILCHRIST SPARKS, III, ESQ.,
Morris, Nichols, Arsht & Tunnell,
-and-

PAUL K. ROWE, ESQ.,
(New York Bar)
Wachtell, Lipton, Rosen & Katz

For the Defendants MCA and the Individual Defendants.

R. FRANKLIN BALOTTI, ESQ.,
Richards, Layton & Finger,
-and-
MARY KAY VYSKOCIL, ESQ.,
(New York Bar)
Simpson Thacher & Bartlett

For Matsushita Electric Industrial Co. Ltd.

CRAIG B. SMITH, ESQ.,
Lassen, Smith, Katzenstein & Furlow,
For the Objectors.

* * *

MR. SCHULMAN:

[16] And having this understanding of the framework between state and federal, and looking at the regulations carefully, we concluded that any 10b-13, 14D-7 claim was frivolous, should not be pursued, would be distracting in the main litigation, and would be a waste of our time and resources when we had a big battle with the defendants underway on the issues of Delaware law.

* * *

[23] So looking at these facts, and evaluating them from the standpoint of the recent decisions from this Court which have interpreted Revlon, Your Honor's decision in the Envirodyne case, Chancellor Allen's decision in the General Instrument case, Vice Chancellor Jacobs' decision in Formica and a slew of others, it was our conclusion that the Court would likely conclude -- not necessarily, but would likely have concluded both at preliminary injunction and trial that the [24] directors had acted reasonably to put in place a procedure that would

achieve the best value, and that a defacto market check had in fact already taken place.

* * *

[31] Although stating valid claims under Delaware law, we were satisfied that we would not be able to prevail in all like likelihood on these Wasserman claims under Delaware law, much less under federal law.

* * *

THE COURT: Anything else?

(No response)

Very well. I'll reserve decision, and advise counsel.

We stand in recess.

[Certificate of authentication by Reporter omitted]

IN THE COURT OF CHANCERY OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

IN RE MCA INC.
SHAREHOLDERS LITIGATION) C.A. No. 11740

- - -

Courtroom No. 106
Public Building
Wilmington, Delaware
Thursday, Jan. 21, 1993
12:04 p.m.

- - -

BEFORE: HON. MAURICE A. HARTNETT, III,
Vice Chancellor.

- - -

ARGUMENT ON PLAINTIFFS' APPLICATION
FOR APPROVAL OF A SETTLEMENT
AND ATTORNEYS' FEES

- - -

[2] APPEARANCES:

JOSEPH A. ROSENTHAL, ESQ.
Rosenthal, Monhait,
Gross & Goddess, P.A.
Liaison Counsel for the Plaintiffs.

STEPHEN G. SCHULMAN, ESQ. (New York Bar)
Milberg Weiss Bershad Specthrie & Lerach
Lead Counsel for the Plaintiffs.

MARTIN P. TULLY, ESQ.
Morris Nichols Arsht & Tunnell
-and-
THEODORE M. MIRVIS, ESQ. (New York Bar)
Wachtell Lipton Rosen & Katz
for the MCA Defendants.

DAVID L. RENAULD, ESQ.
Richards Layton & Finger
-and-

PAUL C. CURNIN, ESQ. (New York Bar)
Simpson Thacher & Bartlett
for the Matsushita Defendants.

CRAIG B. SMITH, ESQ.
Smith, Katzenstein & Furlow
for Objectors, Marian Minton and Pamela Minton
de Ruiz.

JAMES H. ALLYN, ESQ. (New York Bar)
for Objector, William A. Krupman.

- - -

[3] *PROCEEDINGS*

THE COURT: You may proceed.

MR. ROSENTHAL: Good morning, your Honor. Or good afternoon, I guess. It's just a bit past the hour of noon.

This is the time fixed for hearing the proposed settlement of the MCA Shareholders Litigation. With your Honor's permission, Steven Schulman of the New York Bar will make the presentation on behalf of the plaintiffs. He has already been admitted pro hac vice in this action.

I'll just mention a few housekeeping matters before I turn the rostrum over to Mr. Schulman.

First, the Register's file contains the appropriate affidavit showing that the notice of these proceedings was mailed in conformity with your Honor's order calling for the sending of notice and the holding of this hearing, and also that notice of this hearing was published in conformity with that order as well.

As I said before, it's a bit past the hour when the hearing was to commence, and I think the record should show that the

only persons in the [4] courtroom are court personnel, counsel for the parties, Mr. Smith and Mr. Allyn, who represent certain objectors, and no one else to appear here to oppose either the proposed settlement or application for attorneys' fees which the plaintiffs would like to submit today.

The only other person in the room is somebody in the back, who is here just to observe. She's not a member of the class, as far as I know.

With that, your Honor, I would turn the rostrum over to Mr. Schulman.

MR. SCHULMAN: Good afternoon, your Honor.

I would respectfully request to reserve five minutes of rebuttal time of the time allotted.

We are here today to propose a renewed settlement of this litigation which we believe is directly responsive to the Court's concerns, analysis and evaluation in its previous MCA decision in this matter.

I need not recount the procedural history. The Court addressed that in its prior opinion. Suffice it to say that actions were filed in September '90 in this Court. They embraced all [5] aspects of the proposed merger and tender offer. The matter was very actively litigated through discovery. A preliminary injunction hearing was scheduled for December of 1990, but at that time the parties entered into a settlement agreement which was submitted for court approval.

The Court did not approve the initial proposed settlement in this matter, but in that opinion gave its guidance as to the areas that we understood required addressing. It is our position that those issues have been addressed with respect to the settlement that is before your Honor today.

In brief, the settlement contemplates the creation of a $2 million cash fund distributable to former MCA shareholders who either tendered into the tender offer of Matsushita or were merged out in the subsequent second-step merger.

In contrast, the prior settlement contemplated certain therapeutic changes in the rights plan of a spin-off entity known as Pinelands, which the Court found at that time problematic in value and of insufficient value to provide the predicate for a global settlement.

A second salient difference between the [6] current settlement and the prior settlement is that class members who wished to exclude themselves from the binding effect of this settlement and any class action determination by the Court with respect to the settlement are afforded a right to opt out of the settlement pursuant to Chancery Court Rule 23(b)(3). This is an opt-out settlement case.

The Court will recall that a great deal of time and effort was spent at the last hearing on the issue whether the settlement clause should be a non-opt-out or opt-out clause. There are cases in this Court that set forth very stringent standards and difficult criteria in that regard. Those issues no longer exist with respect to this settlement, as an opt-out right has been afforded.

[7] I would add that in order to make the opt-out right maximally meaningful it was negotiated in connection with the settlement that not only would there be mailed notice, but that, uncommonly in these types of situations, there would also be a publication notice in the Wall Street Journal, which did take place. This was done with the intention of assuring that the opt-out right would be maximally meaningful in this situation.

I would add that despite the number of objections that have come to the Court and the intensity of the rhetoric, there is no challenge here to the contents of either notice. There is no challenge to full disclosure in that notice. And therefore there can be no question that those shareholders who have elected to opt out or, alternatively, remain in the class -- and while some have opted out, they are relatively small in number. There can be no question that that was based on full information, and that those who remained in the Court should deem it informed consent.

With respect to the procedural posture of the case, there is another fundamental difference as to where we are now as to where we were two years ago. The Court at that time was concerned that the federal securities claims which we sought to settle as part of the global settlement, claims asserted in California federal court under Rules 10b-13 and 14d-10 of the Securities Exchange Act, had not yet been adjudicated. Indeed, those cases were in a relatively early phase at that time. The Court concluded in its prior opinion that based on that lack of an adjudication, that those claims had what [8] the Court referred to as "arguable merit."

Those claims have now been adjudicated. They have been adjudicated on the basis of a full record, full discovery, extensive motion practice and adversarial proceedings of the fullest extent. Plaintiffs in that case have been losers on each and every issue that they asserted in that proceeding. Their claims have failed.

In brief, summary judgment has been granted by Judge Real with respect to the claims against Mr. Wasserman, Mr. Sheinberg, MCA. Judge Real concluded that there is no private right of action under SEC Rule 10b-13 and that the Wasserman transaction did not fall afoul of Rule 14d-10 because it was negotiated and entered into before the tender offer period and consummated thereafter.

This ruling was based on findings of fact and stipulated facts and extensive discovery and a legal analysis of the cases, some of which were before your Honor at that time, and other subsequent authorities, such as the Kahn case in the Eastern District of Virginia and the Second Circuit affirmance in the Kramer case, all of which convincingly demonstrate that a private transaction [9] entered into outside a tender offer period shall not be integrated with a tender offer to make the private transaction in any way subject to either the Sithe purchase or best price provisions of 10b-13 and 14d-10 respectively.

As significantly, if not more so, the federal plaintiffs in California sought class certification. This was twice fully and

finally denied by Judge Real on all Rule 23 criteria. There is no class in the so-called "federal class actions." Thus, absent class members cannot, in the present posture or in any posture that I can envision, have any benefit from that proceeding. The persons who might benefit, if at all, if a number of remote scenarios took place, would be the individual plaintiffs, and even there they must obtain a reversal of their decisions in that court. But the fundamental fact is that class certification has been denied, and for the many thousands of MCA shareholders, all of whom have elected not to opt out, other than the few who have opted out, there is no prospect of recovery in that case because it's not a class action. And one must question at this time whether or not the statute of limitations has [10] expired, such that any new plaintiff could come along and seek to represent those claims which the Epsteins, the Rockfords and others in that case have failed in asserting.

I might add that the plaintiffs in this case, in addition, were sanctioned by Judge Real for failure to provide necessary discovery in connection with class certification. Plaintiff Epstein was found to have testified falsely and under false pretenses in concealing in his deposition testimony that his shares were held in a tax-free account, free of tax consequences. Thus he had no standing to assert the so-called 10b-13 and 14d-10 claims. Judge Real indicated that had he not dismissed the case in its entirety, Mr. Epstein would have been disqualified because of that fact alone.

Mr. Epstein in late '91 filed an action against Lazard Freres in New York State court on a theory of negligence by that financial advisor at MCA. In a lengthy opinion issued in September of 1992 Judge Baer of the New York Supreme Court dismissed this second action by plaintiff Epstein on res judicata grounds.

Thus, the California plaintiffs have had [11] their day in court and their claims have been found to be lacking in substantial merit and dismissed with prejudice. They are on appeal to the Ninth Circuit. In our view, that does not affect the fairness of the settlement proposal we are making today. It is

the adverse adjudication of those claims, based on a legal analysis demonstrating that they lack merit, which demonstrates that the right to get $2 million now rather than be on line to recover whatever may be recovered in those cases is a fair and reasonable proposal, because those cases are lacking in substantial merit and have been dismissed and do not speak for a class.

As before, the parties do seek a global settlement of estate claims and all related federal claims arising from the MCA/Matsushita acquisition. This Court's power to effectuate such a global settlement and release of claims has already been determined to exist in this case and cannot be questioned, as it is supported by wide-ranging authority of the Supreme Court of this State, this Court's own practice and federal courts who have honored state court releases of federal claims otherwise outside the jurisdiction of the state [12] court. As a policy matter Delaware courts have effectuated such global settlements based on the realistic assessment, as your Honor recognized in his prior opinion, that if there is to be any prospect of settlement at all in contested corporate litigation, over which this Court exercises wide and frequent jurisdiction, there must be included the release and termination of any actual or potential claims arising from the same transaction. This is a power routinely exercised in this Court. Your Honor has issued opinions in that area. Other judges of this Court have done the same. And cases involving federal claims which are pending in federal courts, which have been pending in federal appeals courts, have been terminated.

In the Sithe-Energies case your Honor terminated a California Superior Court case that was arising from the same facts and circumstances as the settled Delaware matter.

In the Becore Western case Vice Chancellor Berger terminated an action which was pending in a federal appeals court and raised federal securities claims based on the overall assessment that the global settlement and release of [13] all claims was fair in relation to the consideration supporting the settlement.

The question whether this settlement should be approved, therefore, is based on this Court's independent business judgment as to the benefits of the settlement in relation to the risks and prospects of continued litigation. That analysis embraces both the state and I think the federal claims, although the impact of the federal court's District Court dismissal certainly I think is of weighty impact in the analysis and suggests, as I have indicated before, and reinforces the lack of merit of those federal claims that have now been litigated.

We respectfully submit and will endeavor to show that the $2 million cash fund now being made available through the settlement does in fact represent fair and more than adequate consideration for the global release of all claims.

This Court previously determined, based on a similar record as is now before the Court, that the State law fiduciary duty claims were relatively weak, in its view. We don't interpret that to mean that they don't plead a proper action, but that in [14] light of the evidence before the Court, which was available through preliminary judgment proceedings and depositions of the senior MCA officials, the Court made a determination that under Revlon there was not a viable claim that would be sustained at trial with respect to the market check and efforts to maximize shareholder value in this case. And we, having litigated these cases before your Honor, go in with our eyes open and are satisfied that those claims are highly uncertain of resolution, and if we went to trial we are not optimistic that those Revlon claims would survive.

Nonetheless, they are in the case and they did state a valid claim as a predicate for this action, but they are of insufficient value, I would suggest -- and I think the Court would have to conclude, based on its prior opinion -- to call into question a $2 million settlement.

We also demonstrated before that the Wasserman transaction involving his capital contribution agreement was a pleading matter and was pleaded to implicate Delaware law issues as to whether he was abusing or taking advantage of his insider position. The Court found, based on the [15] evidence

before it, that Mr. Wasserman was free under Delaware law to work out his own arrangement for his shares and that he had not abused his insider position in connection with the transaction.

It is simply the case that although that matter does not have litigable merit, it is still in this case and is the precise factual predicate for the issues being litigated in California, thus reinforcing the propriety of the global release that we seek.

The Delaware issues having been, I think, fully reviewed before, the focus is obviously here more on the federal claims which I have already prefaced. But as a threshold matter I think it's important to state what this Court need do and need not do in assessing those claims.

The objectors have brought all the appellate briefs from California into this proceeding. I think they are either trying to persuade your Honor to function as a shadow appellate court deciding de novo Judge Real's adverse rulings, or trying to persuade your Honor that you shouldn't get into these issues; that they are best left to another forum.

[16] We'll deal with those issues. But there's a fundamental issue here as to why or whether the Court should even get into a detailed assessment of the federal claims, and it need not. And the reason is this: Because class certification has been denied by Judge Real, and that is based on detailed findings as to the inadequacy of these plaintiffs who were held in contempt. That class certification denial is subject to a stringent abuse of discretion standard.

This demonstrates that even if one could entertain the unlikely scenario of a reversal in the Ninth Circuit on the dismissed federal claims -- and I mean on the substantive issues -- something that we think will not happen because of the state of the law and the findings of fact here. But even entertaining that assumption, the likelihood that the Ninth Circuit will interfere with and overturn Judge Real's negative determination on class certification is, I think, completely beyond the realm.

This is based on a full record and Judge Real's direct dealings with those plaintiffs and an abuse of discretion standard that ties the appeals [17] court's hands. The likelihood that Judge Real would reinstate these same plaintiffs on any remand, were it to occur, is, I think, most remote, if one reviews the findings of fact in this case.

With respect to any new champion of these claims coming along, I would submit the U. S. Supreme Court's decision in the Lampf case, establishing a one-year-from discovery rule of statute of limitations for Exchange Act claims. In a case that has now been denied class certification, I suggest, your Honor, that it is much too late in the day to think of new plaintiffs coming forward on behalf of this class.

So the reason I say the Court need not become an expert on federal securities laws is because even if one accepted every assumption of Mr. Smith and the California plaintiffs' attorneys about what a sensational case they have, which we think are without foundation, they could be right on every one of those points and it wouldn't matter because the absent class members cannot benefit from a recovery in California which is pursued and recovered only on an individual basis without any prospect for classwide recovery.

[18] I think it's also significant that a federal judge, based on a full record, has dismissed the claims and that this Court should not simply substitute its judgment for that court, as if it were a Ninth Circuit court justice, but I think should give presumptive effect to Judge Real's elaborate findings of fact and conclusions of law that there is no federal case.

But since the matters have been brought before your Honor, and since we as plaintiffs' attorneys who negotiated this matter continue to monitor the federal proceedings, have studied and analyzed the federal briefs, the appellate briefs and the cases on which they rely, we think the ultimate nail in the coffin here is that Judge Real is right. He is right on the facts and he is right on the law, and much of his ruling was based on stipulated facts.

The Court found, as I indicated, no private right of action under 10b-13. That's very substantially supported by that rule itself, which does not expressly or impliedly, as part of the scheme of which it is a part, in any way suggest the existence of a private right of action.

[19] The Court found that the Wasserman transaction was negotiated and agreed to prior to the tender offer and performed thereafter. He did not integrate and resisted arguments to integrate the Wasserman transaction with the tender offer because as a factual matter they create separate obligations which were separately negotiated, and as a legal matter, as reflected in the relevant case law before him at that time and now reaffirmed by Kahn and Kramer and a whole slew of SEC releases and consistent authority in this area, a private transaction negotiated prior to a tender offer and performed thereafter, which is separate from the tender offer, is not in the tender offer and, therefore, is not subject to the peculiar constraints of the tender offer rules.

Judge Real looked at the Field v. Trump decision, and knew that in the Second Circuit's affirmance in Kramer, a subsequent decision, Field was limited to the ruling as to when you would integrate two successive tender offers and determine whether a first one had been withdrawn and a second one was really part of the same thing, to determine whether private deals in the interim were or were [20] not afoul of the Sithe purchase rule.

But that's all that Field speaks to. It doesn't speak to this situation. This is a privately negotiated separate transaction which the Court has ruled as a factual and legal matter is not subject to the constraints of 10b-13 and 14d-10. There is no case that provides support for the integration of those transactions.

One does not have to definitively determine for purposes of this settlement that the federal claims have no prospect. One does not have to become an expert on federal securities laws. But what the Court is doing is checking our business judgment in settling. And we went through and reviewed the law

and we reviewed the briefs and we looked at the findings of fact. As plaintiffs' attorneys who litigate these cases throughout the country, we have made a professional judgment that we think is supported by the whole record that the risks and uncertainties of that federal claim are so fraught with uncertainty, that those claims are so weak, that the record in that proceeding in California is so horrendous, that the prospect of anything emerging from that case is so remote, that [21] $2 million more than adequately compensates -- much more than adequately compensates for the release of all the federal and state claims here.

I would note that after full disclosure in the notice there have been only two objectors, two who are aligned in interest with Mr. Minton, the California plaintiff, and 18 opt-outs, representing a minuscule proportion of shares, and half of those opt-outs by shares are Mr. Minton himself. So, in effect, the class of 78,000,000 shares and in excess of 20,000 shareholders has embraced this settlement.

Let me turn briefly to the objectors.

Mr. Krupman prepared an affidavit which the discovery proceedings have demonstrated was predicated on a draft document that came to him or his attorney from the Kaufman Malchman firm, which is the counsel for the plaintiffs in Los Angeles. We sought production of that document and were informed by Mr. Allyn, who is in the courtroom today, that the document was thrown out. I'm told by defendants' counsel that we can't obtain it from the Kaufman Malchman firm, a firm that at the outset of this case formed part of the Delaware committee of the whole but splintered off to pursue its own [22] case in California.

Mr. Krupman is simply a surrogate for those California attorneys, and he has said nothing in his papers that in any way contradicts the analysis in our brief, the defendants' brief or what I have said today with respect to the lack of substantial merit of those federal claims and the propriety and policy propriety of effectuating a global release.

The Minton story is somewhat more intriguing. On December 11 Marian Minton, wife of Walter Minton, filed a notice of intent to appear and object to the proposed release of federal claims. On December 31 she filed her brief, and there was no mention of the federal release. She objected on notice grounds, which I will get into in a moment. Her stepdaughter, Pamela Minton de Ruiz, stepped up to the plate to become the objector on substantive issues.

We took their depositions -- both of them. We found out that after Mrs. Minton had made her initial appearance in this case it came to the attention of her side that because she had not tendered into the tender offer but had been a [23] beneficiary of the merger, she had no stance to be a plaintiff in the California action, which was only for the benefit and asserted on behalf of tender offer offerees. So how could she object in this Court to the release of claims that she had no standing to assert in her own right?

The evidence indicates that Mr. Minton then arranged for his daughter's appearance and the notice objection was put in by Mrs. Minton.

I think that sequence alone demonstrates what's going on here. Notice was properly provided. The Simpson Thacher papers are conclusive on that. And any problem that Mrs. Minton has with notice I think is the problem and function of her broker, Dean Witter, who, it is clear on the record, sat on the notice for more than 14 days after it received it from defendants and did nothing to bring the notice to the attention of its clients.

Nonetheless, Mrs. Minton was able to appear with an attorney and object. And by the materials before the Court today it is clear that that Dean Witter class has been given notice as of the end of December, the beginning of January. But those shareholders take the risk as holders in [24] street name of this kind of problem. If it exists, it is not really a problem at all. Because in addition to the mailed notice there was publication notice in this case, and it was put in to deal with this problem precisely.

So there's no issue here about notice. It's a trumped-up charge to provide Mrs. Minton a vehicle to stay in this case when her real basis for being here initially was invalidated by her inability to assert standing to be in the federal class.

Mr. Minton himself has opted out. He's used his family members as his vehicles. Thus he won't be bound by the settlement if his objection is unsuccessful and he'll preserve his claims in California. I suggest that the Court should not lend itself to this orchestration. Those claims and arguments they make do lack merit. They do not demonstrate the validity of the federal claims. They do not demonstrate any problem with the granting of a global release. They are faulty and deficient on their face, and background confirms it.

Ultimately the appeal is made to the [25] Court: "Delay. Don't act. If the Court is inclined to approve the settlement, don't act. Await the result of the Ninth Circuit ruling."

We heard this argument before. We heard this siren song of awaiting the results of the trial, and the Court waited, and 15 months later the plaintiffs were thrown out, sanctioned, and their claims are on appeal. So now they want us to wait again.

I would suggest, your Honor, that there are a number of factors that this Court should weigh and consider in response to that request, and they all incline in favor of deciding the settlement on the basis of the information we have before us, which is that which was in the possession of plaintiffs' counsel when they negotiated the settlement and which I believe will continue to hold true throughout the remainder of this proceeding.

The California plaintiffs made an application -- it is in the application -- to the Ninth Circuit to accelerate the appeal in that court -- the oral argument -- so that it could occur before today's scheduled settlement hearing. The Ninth Circuit rejected that request. If the Court [26] had any concern about its actions affecting the appellate processes of the federal court, I should think that this action by the Ninth Circuit would suggest that the Ninth Circuit has no problem and welcomes this

Court's addressing of the release issues in advance of any disposition on the appeal.

The objectors say, "Allow a delay so that we can see what happens in California and take advantage of it, if it should transpire contrary to what all the facts and circumstances would suggest."

I submit that those who wish to preserve the right to benefit from the theoretical possibility of reversal and the even more remote reinstatement of class claims have been afforded the opportunity to opt out. They have done so if they wished to benefit from such an approach. This Court should not delay its filing and thus preclude the overwhelming majority of shareholders for whom we speak from receiving the settlement benefits at this time, when it appears that they themselves are willing to give up these theoretical federal claims that have been dismissed in exchange for having the money now, whose value will dissipate over time.

They very much minimize the delay. But [27] really we're talking about a very substantial delay. It's not just a few months. If they lose, they have a record. They may further appeal it. Even in the remote situation of a reversal there's going to be a remand.

The point is, the delay here is open-ended and indeterminate. In the meanwhile the settlement process in this Court is held hostage. There is no authority for such an approach.

I would submit that the strong policy in this Court which your Honor has referred to in any number of written opinions that favors settlements and recognizes the wisdom and the necessity of global settlements is in the balance. If there's a precedent by this Court that a dissident group of federal plaintiffs can go off, litigate their own case, lose, and then come back here and attempt to hold the settlement process hostage for an indefinite period of time, I think that this is contrary to the policy of this Court and this State with respect to the effectuation of global settlements, and would be contrary to this Court's wide-ranging jurisdiction in this area.

Your Honor, that concludes my opening [28] comments. We have a fee application. I would prefer to submit it on the papers. I think I would recognize the settlement issues are paramount in today's proceeding.

Unless the Court has any questions of me, either on the settlement or fee, I would like to defer to Mr. Tully, who speaks for the defendants.

THE COURT: Very well.

MR. SCHULMAN: Thank you.

THE COURT: You have already used your half-hour.

MR. SCHULMAN: Your Honor, I apologize. If Mr. Tully may just be given a few minutes.

THE COURT: Very well.

MR. SCHULMAN: Thank you.

MR. TULLY: Your Honor, thank you. I'll try to be brief.

I emphasize again to your Honor the fact that after two notices and a publication notice in the national edition of the Wall Street Journal in November, only 18 class members have chosen to opt out. This creates a very strong presumption that the members of the class want this settlement and they do not want the substantial delay which would [29] come from the long-shot attempts by a few individual plaintiffs to revive their now dismissed federal claims.

This isn't just the defendants' view or the plaintiffs' view here, your Honor. This is the view of the Ninth Circuit in their Marshall decision, which we cited to your Honor in our brief. That court, in affirming the approval of the settlement by the trial court, over objections, said that the unsuccessful objectors "... had the right and opportunity to opt out in this action. They chose not to. We believe that they should not now be allowed to play the role of spoilers for a class of more than 31,000 people when they could have chosen not to be bound by the settlement."

That, of course, is equally true here. Indeed, most of the Mintons have opted out. They can pursue their individual action, as can some of the other plaintiffs who have opted out of this settlement.

The suggestion that your Honor stay the processes of this Court in favor of a final resolution of the proceeding in California we believe has no merit. First of all, it's only [30] individuals who are pursuing appeals in California. There is no class action in California. To deny the class here, the only class that exists, the benefits of this settlement would frustrate the Delaware policy favoring settlement and, indeed, would frustrate Rule 1 of this Court, which directs that all matters, including matters under Rule 23, be resolved in a just, speedy and inexpensive manner.

Instead, the objectors here advocate that your Honor monitor the process in an ongoing appeal in the Ninth Circuit, presumably then evaluate whatever subsequent opinions that come down, and hold further proceedings here on the meanings of such rulings or decisions. Such a process makes no sense and is unnecessary, given the abundant notice of those claims here and the right to opt out, which some shareholders have chosen to take and others have declined in favor of the benefits of this settlement.

Let me make one final point. Objector Minton in her brief takes defendants to task for having failed "to negotiate with the attorneys for the federal class actions." She also says, "It's those plaintiffs who can best represent the class [31] with respect to the federal claim."

Your Honor, there are no federal class actions. Class action status, as Mr. Schulman pointed out, was twice denied, although this fact nowhere appears in the objectors' briefs to your Honor.

The prospect of any success in attempting to reverse that discretionary denial of class certification is virtually nil, a fact which is conceded de facto by the plaintiffs in California in their appellate briefs, where they devote only a couple

paragraphs to the class certification issue out of hundreds of pages of briefing.

Secondly, there is a class action, and it is before this Court in this proceeding. We negotiated with class counsel, the only class counsel there is. It is for this Court and for the class representatives to evaluate the merits of all claims to be settled in a global settlement. The Ninth Circuit decision which I read to your Honor squarely supports that view.

Indeed, why would we, as defendants, negotiate a settlement with attorneys who do not represent a class, who have been held in contempt by [32] the California federal court, and who believe, contrary to reason and the findings of fact and conclusions of law of the chief judge in California, that their claims are meritorious and worth astronomical amounts in damages?

We believe that the State claims and the federal claims are weak. Indeed, the federal claims stand on even a weaker jurisprudential footing than the State law claims that your Honor evaluated preliminarily on the last settlement. After all, the federal claims were re-evaluated after full discovery, twenty depositions, vigorously stipulated facts submitted by both sides. They were definitively addressed in detail.

But even if there's a million-to-one shot on appeal in California, that shot is protected by the opt-out right which is part and parcel of this settlement. Anyone who has a different view than Judge Real, than class counsel or than the defendants on the merits of those now dismissed claims can take that gamble by opting out. Eighteen people have chosen to do so. The other thousands of shareholders have chosen the settlement consideration and should be granted it without [33] further delay.

Thank you, your Honor.

MR. SMITH: May it please the Court: My name is Craig Smith. I'm the attorney for objector Marian Minton as custodian for Catherine Minton, a minor, and also attorney for Pamela Minton de Ruiz. Although Mrs. Minton is Mrs. Ruiz'

stepmother, they are differently situated and they object to the proposed settlement for different reasons. I will treat them separately.

I will attempt to be brief. Today, your Honor, I'm not going to mince very many words.

In the first instance, the Court has before it a settlement proposal, and the Court must exercise its own business judgment as to the bona fides of that settlement.

I'm a little puzzled. These are the papers that the defendants have filed (holding up papers). It is about two inches thick. We've got about three inches from the plaintiffs in support of this settlement.

This is what the settlement is worth, your Honor: two cents. And that's all. $2 million divided by 78,000,000 shares, the approximate number [34] of shares outstanding, is two and a half cents a share. Deduct the fees and expenses that the plaintiffs' counsel want, and you get a net of a million three. Divide that by 78,000,000, and you are down to 1.6 cents per share.

Chancellor Allen in a case we submitted to the Court earlier today, in response to the papers filed by the proponents of the settlement in Stepak v. Tracinda Corp., found that 12 to 13 cents per share in a settlement -- that was the gross amount -- when reduced by plaintiffs' fees and counsel's fee, of 5 cents net to shareholders, did not even represent or barely represented nuisance value of the claims. The Court said in that case that the terms of that settlement were a concession that both sides saw the litigation as without merit.

I would submit in the first instance, your Honor, that just the nuisance value alone of these State law claims and the federal claims is greater than two cents per share. The settlement is inadequate even as a settlement of nuisance value.

What is being given up? Worthless State law claims and federal claims that are still in the process of being litigated, and vigorously [35] litigated, in California. The value of those

federal claims is estimated to be 10 to $20 per share. And if we take this 1.6 cents per share settlement, looking just at our federal claims, if you take the high end, $20 a share, they are being settled for 8/100 of one percent of their value. If you say, "That's too much. Let's take it at $10 a share," the claims are being settled for 16/100 of one percent of their value. If you go all the way down to a dollar a share as the real value of those federal claims, they are being settled for 1.6 percent of the claim. That is a minuscule amount.

If you simply look at what one might call a cost benefit analysis in a very rudimentary sense, the California litigation is on appeal. It's fully briefed. There's no incremental cost in going forward except the minimal cost of oral argument before the Ninth Circuit. We have these federal claims that may be worth up to 420 a share, and we have a choice. We can take a chance on what the Ninth Circuit will do, or we can settle them for 8/100 of one percent of their value, or maybe one percent of their value. But it is a de minimis amount.

[36] If you weigh what is being given up, that opportunity for material and substantial recovery, against two cents per share, I don't think it's a very difficult analysis to see that the risk of losing two cents a share, an amount not even equaling the nuisance value of the claims, is a risk worth taking.

Sound business judgment often entails taking risks. I admit two cents a share is worth more than nothing per share. But I submit it is so negligible in value that to risk its loss against the potential for the far higher return of the California litigation and the federal claims being litigated out there would be the exercise of sound business judgment. Frankly, these two pennies per share are too little here to make the settlement worth the sacrifice of those claims.

Let me comment for a moment on the theory that there is no class. Class certification was denied. It has been appealed. It can be reversed on appeal. There are still class members. The notion that somehow, because the class certification has been denied, the statute of limitations has run is erroneous. I cite to [37] Edwards v. Boeing Vertol Co., 717 F.2d 761, a

1983 decision by the Third Circuit Court of Appeals, which held that where class certification is denied but that denial is appealed, the statute of limitations is tolled until there is a final determination on the issue of class certification. That doesn't happen until the appeals are exhausted. I would specifically refer the Court to pages 765 and 766 of that decision for the discussion of the Third Circuit.

So the reality is, if the Ninth Circuit reverses, there is still a class in California. There are still people out there who could assert those federal claims. I think that's important because I think in part that is the explanation of why this settlement from the defendants' point of view is being pressed so hard.

The proposed settlement -- strike that.

Let me go back and just remind the Court of a little bit of the procedural history here. I will be briefer than Mr. Schulman.

The Delaware actions were filed and then the California actions were filed, and then there was a settlement struck between the defendants and [38] the plaintiff class in this action, and then the Delaware complaint here was amended to include the factual predicate for the federal litigation, and then they sought this Court's approval of their proposed settlement. So, in short, once they found out there were federal claims, they quickly amended the complaint here in an effort to get their settlement through. I think that says a lot.

The proposed settlement is worth slightly less than two cents per share. The plaintiffs' counsel expect to receive over half a million dollars in fees, plus they have asked for some $116,000 of reimbursement for costs for their efforts in settling extremely weak State law claims and releasing federal law claims in which they have no interest. They don't want to prosecute them, they didn't press them, and they certainly couldn't prosecute them in this Court, given the federal court's exclusive jurisdiction.

For $2 million the defendants purchased an insurance policy, in effect, shielding them against potential liability that

could range from $780 million to perhaps as high as a billion and one-half. And they get to avoid dealing with the [39] counsel and the plaintiffs who are most interested in those claims, who have an interest in pressing those claims as a class action in federal court, who have litigated and continue to litigate vigorously those claims.

I think this two-cent settlement is collusive. The facts of their case are a paradigm of the kind of collusion that this Court I believe as a matter of public policy -- indeed, as a matter of public trust -- should not sanction. Approval of settlements of this kind serve only to undermine public confidence in our legal system. And this Court understands that.

I don't think anyone here today fails to grasp the true nature of this two-cent settlement. I quote from Professor Coffee's article, which was reproduced as an exhibit to the papers filed by Mrs. de Ruiz in objection:

"Today, there may be a third form of collusion appearing on the horizon. Under it, the parties to one action (in state court) negotiate a non-merits based settlement in which at least one of defendants' primary goals is to preclude plaintiffs in a different case (in federal court). In short, [40] one group of plaintiff attorneys effectively sell the legal claims raised by another group in order to enhance their own settlement at the expense of the absent group.

That, your Honor, I submit is what is happening here. A year ago this Court held that the State law claims sought to be litigated by the plaintiffs here were substantially without merit, and the federal claims were the only claims that appeared to have substantive merit.

I think what that means is, the plaintiffs here don't have anything to sell to the defendants by way of settlement except the federal claims. And those claims aren't raised here. They are raised in California. They are being sought to be settled here by way of a release to enhance the settlement here and at the expense of the California litigants, who would include Mrs. de Ruiz.

The defendants, too, benefit. They don't have to deal with the California attorneys. They are the ones who have been willing to expend the time and the effort and the money, first at the trial level and now on appeal, to enforce what they believe to be the class rights in connection with [41] these federal claims.

It's no wonder the defendants would rather deal with the plaintiffs here. One need only compare the docket, which has over 500 entries in California, to the docket here. What's been done here: They filed a complaint, an amended complaint. They have taken three depositions over the course of two days. They have had one document production request. And that's pretty much it, other than settlement. By comparison, in California they were almost on the eve of trial or certainly approaching trial in California when the Court ruled on the summary judgment motion.

The federal claims have material value. I think the defendants' and the plaintiffs' own papers amply demonstrate that fact. The defendants say the federal claims have no merit. There can be no class action to pursue those claims because the statute of limitations has run. Why do they want to settle them here? Why do they want a release? If they are correct, if they believe that, they wouldn't need a release.

They say the only people who can pursue the federal claims are the individual named [42] plaintiffs in the California action, and I suppose those who have opted out. All others are barred because of the statute of limitations. At least that's their argument, as I read it.

We know that argument is wrong. The Third Circuit tells us that the statute of limitations continues to be tolled until there's a final adjudication. So if there is a reversal, there is a possibility that there will be a class action in California.

Why do they need a release of the federal claims? They have no faith in their position. I can only surmise that they are afraid that Judge Real will be reversed. He does have the

highest reversal rate, apparently, of any District Court judge sitting in California.

I think they fear the prospect of having to litigate the California action on its merits, so they want a release. They certainly are not afraid of the State law claims, because this Court has already told them that they have little or nothing to fear with respect to those claims.

We aren't suggesting that this Court second-guess the federal District Court in [43] California or attempt to predict what the Ninth Circuit will do, and it was not for that reason that we submitted the appeal briefs filed in California. We submitted those really for only two reasons: to show that the plaintiffs in the California actions were seriously litigating material federal claims and that briefing before the Ninth Circuit was complete.

This Court should not ignore the posture of the federal litigation. It has gone forward. The defendants admit that there was substantial discovery in that action, and I think the appellate briefs show that the plaintiffs there are pressing hard on their claims. And I think if your Honor reads those briefs, not for the purpose of second-guessing either the District Court or predicting what the Ninth Circuit will do, but reads those briefs with a view to assessing whether there are meritorious claims still alive in California, I think you will reach the conclusion that those claims are meritorious and they are worth more than two cents a share.

Several years ago Chancellor Allen faced a similar problem in Stepak v. Tracinda Corp. There [44] the Chancellor was faced with a proposed settlement that offered 12 to 13 cents per share, five cents after attorneys' fees and expenses were deducted. And that proposed settlement, if approved, would have settled claims being litigated in the California State courts. Chancellor Allen had this to day, and I quote:

"... it is not necessary to engage in a subtle or detailed analysis of the expected value of such claims as the class may possess in order to conclude that this proposal is not worthy

of serious consideration. Only were the Court able to conclude that those claims have only nuisance value could the proposed settlement conceivably be approved."

That's at pages 13 and 14 of his opinion.

The Chancellor further concluded that the five cents per share settlement value represented, and I quote, "... an implicit agreement by the parties negotiating it that the case was totally without merit." That appears at page 12.

The Chancellor went on and said something else that I think is very significant. He said, "Rule 23(e) mandates substantive court review, [45] in part at least, because the class action form of action does make possible opportunistic behavior at the expense of absent class members. Where there are two or more attorneys purporting to act on behalf of the same or overlapping classes, there is a special risk that a defendant will seek advantage in choosing the adversary with whom it will negotiate, and a risk that the blessed plaintiff will be accommodating in exchange for an agreement that includes legal fees." Page 15 of the Chancellor's opinion.

And finally, one more passage from that case, and I quote: "While I would not say without a more thorough investigation that such conduct" -- referring to possible sell-out of a class -- "has in fact occurred here, I note that the history of the prosecution of these matters seems consistent with that possibility. In all events, candor does impel me to say that the proposed settlement, alone among the many such applications I have been required to review, engenders disdain that is pronounced and lingers. It is frankly unimaginable that I could exercise my judgment to approve it as fair to the class. Moreover, approval of such a proposal would, [46] in my opinion, threaten to hold the class action mechanism up to justifiable scorn and to charges, too frequently made without adequate grounds, that the stockholder class action mechanism represents nothing so much as a device for lawyers to enrich themselves while serving no practical interest of those for whom they are charged to act." That appears at page 16.

For that reason the Chancellor stayed the Delaware litigation so that the more actively litigated California case could proceed, and he refused to even schedule a hearing on the proposed settlement.

I think, your Honor, all of those principles are applicable here. I have already reviewed the brief history of the litigation here, and it is indeed brief: three depositions and some documents, and a settlement, and a settlement that was conjured up to take into account federal claims, when those claims arose way back at the inception with the filing of at least two class actions or more in California.

So there is little doubt that the California federal actions have proceeded on the [47] merits. Here there's been a little bit of discovery, but plaintiffs mostly have sought to settle. The value of the settlement proposed today: two cents per share. It is negligible. The State claims here have little value, if any.

If anything of value remains, it is the federal claims. Somebody is afraid of those claims or they wouldn't seek to release them. I think that the purpose of this two-cent settlement is to provide defendants with a way to have the valuable claims in California released as a part of settling extremely weak State law claims here.

I think these facts are remarkably close to those that faced Chancellor Allen in the Tracinda case. I think they call for a similar result.

Let me turn very briefly to Marian Minton.

THE COURT: Are you going to share your time with someone else?

MR. SMITH: I am going to share my time with Mr. Allyn. If I may have just one minute for Marian Minton.

I think there, your Honor, that we have submitted papers and some additional papers this [48] morning which show that

there are at least some 600 beneficial holders who never received notice in time to even appear and make an objection.

I don't really want to find fault with anybody, either Dean Witter or with the defendants in this case, but I think it shows perhaps a system that didn't work very well over a period of time when, given the holidays and the short period of time for the notice in relative terms, there are a fair number of beneficial holders who have never received notice. That may be one explanation why there are so few people here today.

Your Honor, we filed this morning on behalf of another objector and, as a courtesy to Mr. Allyn, a motion for his admission pro hac vice. I don't know if your Honor has received that motion or not. If not, I have a copy of it that I could hand up. If the Court will permit, I would introduce Mr. Allyn at this time and move his admission.

THE COURT: Yes, it's here. I've signed it.

MR. SMITH: Thank you very much, your Honor.

[49] MR. ALLYN: May it please the Court: My name is James Allyn. I represent the objector, William Krupman.

Vice Chancellor, this settlement is not fair and it should not be approved. In explaining why, I will first describe how Mr. Krupman and I came to be here today, since you have heard allegations that he and I are pawns or straw men of the Kaufman Malchman firm.

I am a solo general practitioner in New York City. It is an honor for me to be here in this courtroom with these distinguished lawyers today. I am not an expert in securities litigation. Does that buttress their claim that he and I are pawns of Kaufman Malchman? No. In fact, it rebuts that claim, as I will explain.

Mr. Krupman is my father-in-law. We have an excellent relationship. That also means that my expected reimbursement for fees and expenses in this matter is about $691,000 less than what the plaintiffs' attorneys seek.

How did Mr. Krupman come to be an objector here? In November he asked me to review a proposed settlement that was submitted to him. [50] At the end of November at a family dinner he asked me what I thought about it. I did some calculations and came up with the number that he was being offered $2 a share. Fortunately, another relative who is an accountant was there, and he came up with the correct figure of two cents a share. I told him that the attorneys were going to submit an application to get $600,000 in fees.

Mr. Krupman was extremely upset. He believes that MCA was worth more than it was sold for. The deal happened at the price due to an extremely generous compensation package which was received by the directors. He felt the tender offer was inadequate and now he was being presented with a settlement that was inadequate. He asked me to find out how to register his displeasure.

A few days later he gave me the name of a gentleman named Ernest Kaufman in Los Angeles, and asked me to call him for information. I called Mr. Kaufman at the beginning of December. I left a message that I wanted to talk about the MCA case. He never called me back.

Being busy with other matters such as making a living, I did not call Mr. Kaufman again, [51] which is a demonstration of inertia that occurs even among those who wish to object to a settlement.

In mid-December a friend called me up. He asked me to initiate a class action against National Health Laboratories, whose stock had plummeted after they pled guilty to defrauding the government. I explained to my friend that I was not qualified to handle such litigation, given the size of my practice and the level of my experience. I requested that that person send me a copy of the complaint in the matter.

Returning to my office after Christmas, on my desk was a letter from Mr. Jeffrey Squire of the Kaufman Malchman firm. It turned out that his firm had handled the National Health Laboratories matter. He enclosed a copy of the

complaint, along with a cover letter stating that I should feel free to call him if I had any questions about the complaint or if I wanted to discuss securities litigation in general.

I called and left a message for him to thank him for sending me the materials. I also noticed that he was from the Kaufman Malchman firm, the same firm as Ernest Kaufman in Los Angeles.

[52] Mr. Squire was on vacation. However, I left a message. He returned my call nonetheless. I thanked him. I then asked him if he knew anything about MCA. I told him that Mr. Krupman was very displeased and if there was anything he could do, I asked him for ideas and advice on how to contest the settlement. We discussed the case, and Mr. Squire offered to provide materials to use in drawing up an objection. He sent me the Exhibits B through K, which are mainly the federal appeals briefs, which are attached to Mr. Krupman's affidavit, plus a draft objection.

I reviewed these and then called Peter Linden at the Kaufman firm to further discuss them. I edited the draft, typed it into my computer. I then discarded the draft that Kaufman Malchman had provided to me. I printed my own draft, and went through this process a number of times, revising my drafts each time. I do not have a copy of what Kaufman Malchman gave me. I have since stated that in a document request which was made to Mr. Krupman. I asked Kaufman Malchman to provide me with a copy, but they are unable to do so.

I then showed the draft affidavit to [53] Mr. Krupman. I discussed the case with him. He revised the affidavit. I made those changes, and we submitted the affidavit.

The settlement proponents now say that we are a pawn of Kaufman Malchman. That is very ironic to me. We serendipitously came into contact with them after Mr. Kaufman in Los Angeles did not return my initial phone call.

On the one hand the proponents of the settlement point to the paucity of objectors as evidence that the class approves of

the settlement. But look at the hurdles the objectors must overcome.

First, you have to read the imposing settlement.

Second, you must calculate what the settlement will give. Nowhere in the document does it explicitly say outright that each share will get two cents.

Third, you must notice that $600,000 comes out of the pot, plus expenses which are not enumerated in the proposed settlement and turn out to be over 100,000.

Fifth, unless you have a son-in-law who will represent you for free, you must hire an [54] attorney to object, at a cost of several thousand dollars. If you do have a son-in-law, he can represent you for free, but if he obtains help in creating your objection from a party with obvious motives for opposing the settlement -- but who else but such a party would offer assistance -- your objection will be dismissed by proponents of the settlement as not your own.

Is it really surprising there are not more objectors here today?

Mr. Krupman is objecting of his own volition. I needed help in presenting that objection to this Court. Kaufman Malchman did, indeed, provide me with that help. However, that does not change the fact that this is Mr. Krupman's objection.

Why does he object? This settlement is not fair. The plaintiffs cite the monetary reward to the class, but that's only two cents a share. If this was only the Delaware action, two cents a share would be fine, probably generous, since this Court found those claims probably meritless. In that case a fair settlement would really be nothing for the class. Mr. Krupman would be annoyed, but so be it. [55] The defendants successfully structured the transaction so that no laws were violated.

However, here the class is also giving up a potentially lucrative federal action. Granted, that action was dismissed by

the lower court. However, the appeal raises a number of issues that were not cut and dried. If the lower court is reversed and the class certified, obviously the class members will have great leverage to extract a much more beneficial settlement.

Of course, if the decision is upheld on appeal, that leverage virtually evaporates. But in that case the class would not be deserving of money anyway, since again it had no valid claims. Settling this case before the federal claims are decided gives the shareholders virtually nothing.

Mr. Krupman is willing to wait to receive his very small settlement check until the federal actions are decided. If the dismissal and denial of class certification are upheld and the defendants then refuse to pay anything to the shareholders, so be it. They had their day in court and it was determined that their claims were meritless. What do they give up in that case? [56] Two cents a share. But if the lower court is reversed and the class certified, the shareholders will be in a position to obtain a substantially better settlement.

It is extremely unfair to give up such a potentially lucrative settlement for next to nothing, and Mr. Krupman strongly objects to the proposed settlement.

Thank you.

MR. SCHULMAN: Your Honor, may I briefly be heard?

THE COURT: Very well.

MR. SCHULMAN: Thank you.

Your Honor, the Delaware Chancery Court in 1935 wrote in the Karasik case, "... the amount claimed is one hundred million dollars and the amount received in settlement is a minimum of three hundred and eighty-five thousand dollars. Now that is a wide disparity. But it is one thing to assert a claim and another thing to prove the claim to judgment. Furthermore, it is one thing to obtain a judgment, and quite another thing to collect it. Figures, however imposing, should not compel practical considerations to yield place to visions."

[57] This Court is understanding of that logic. It has applied it itself in other cases. All courts confront this issue.

We have here a $2 million settlement. It doesn't matter how many shares are outstanding. One can divide it as many times as they want. If we had a $10 million settlement they would say it is seven cents a share. If we had a $20 million settlement they would say it is 30 cents a share. Where does it stop?

That's not the way this Court evaluates settlements. The Court looks at what's being made available to the class through the settlement and it makes a probabilistic assessment of what is coming to the class potentially through the litigation. It doesn't adjudicate claims, and it looks and makes this analysis through the optic of favoring settlements and recognizing that this allows people to get on with their affairs, to allow the courts to move on with their affairs, and to put litigation and weak claims to rest or to allow claims to be released in present money instead of burdening the courts with continued litigation where there's no real prospect of success.

[58] I have heard a lot here about this division, this arithmetic. I heard in nothing of what Mr. Smith or Mr. Allyn said about the points that I made and about the findings of Judge Real with respect to the federal securities claims. There is no answer to the analysis and the rejection on private right of action. There is no analysis on the tender offer, period. There is no analysis in the record of this case on Judge Real's finding that Mr. Wasserman, when all was said and done, received stock that was not worth more than the $66 per share that the shareholders received presently in cash. All we have heard is rhetoric.

If these objectors had come to this Court two years ago and made those arguments, I might understand it. But to make those arguments now, with the history of this case and the amount of time and effort that's gone into it, without fruit, is to me absurd.

They had a burden to explain to your Honor why those claims are going to succeed on appeal, what are the realistic prospects to success, to grapple with the issues as we have attempted to. All I hear is the clink of money on a podium in this [59] courtroom: a jury trick; not an argument. Not appropriate for this courtroom.

The last time Mr. Smith came to this Court and he said, "Your Honor, there's only one problem with this settlement." Remember, that was the poison pill settlement. "There's one problem. There is no opt-out." That's all he argued. Andrew and David Minton, members of the Minton family.

Now we have cash. Now we have an opt-out. And now I hear after two years of litigation that that's not enough; that these claims which have been a burden on the California court system, that have cost enormous time and effort for the litigation of frivolous claims, we should forget all this, forget the opt-out, which Mr. Smith doesn't even mention in his speech today, and we should just let the California lawyers continue to churn the litigation process until the defendants maybe give up or the courts finally, fully, someday get rid of them without any further possibility of appeal.

This is the kind of case, your Honor, I would submit, that settlements are all about. This is a case where all the cards are on the table [60] and there's a ruling by the Court in California. The dealer has put up his cards. We have that information. $2 million, no matter how many times you divide it by the number of shares, is in all likelihood much more than these individuals are ever going to generate through their burdensome California action.

But if anybody disagrees with what I say, if anyone disagrees with class counsel, they have the right to opt out. Mr. Minton has opted out. He's litigated those claims fast and furiously for two years and I assume, based on what I read, he's going to continue to litigate those claims. If Mr. Krupman wants to litigate those claims, I assume, based on what Mr. Smith says here this morning, that he would be welcomed into

the California fold if they need another plaintiff in light of the statute of limitations.

The reality is, your Honor, that those claims have failed. They have been a manipulation. They have been moving through the court system and they have lost on every substantive issue. They have been denied class certification. They have testified under false pretenses to the Court in [61] California. They have been rejected as class plaintiffs, and they now have the temerity to come to this Court without any substantive analysis and say, "Give us an unlimited option until the California cases are resolved."

I don't have to speculate on what that result is going to be. We know today what a fair settlement it is. It's $2 million to release State law and federal claims that do not have the value or greater value than $2 million. I make that statement on the following basis:

There's no predicate for this $10 to $20 damages figure that you were given. It is a pie-in-the-sky number. You don't get there until you prove liability, until you get a class, until you prove that Mr. Wasserman got a better deal, until they get another plaintiff who can march in and meet the statute of limitations. You don't get there. It is not reality. $2 million, by any stretch on the record of this proceeding today, is a fair settlement.

I hear now the specter of collusion. Mr. Smith on the very day that he made his initial appearance in this case for Marian Minton -- not [62] Pamela Minton -- served discovery requests on all the defendants and the class counsel in this case. Why did he do that? Because he was seeking Barkan/Amsted discovery into the good faith of the plaintiffs' attorneys in the litigation of this matter.

I arranged a roomful of documents for Mr. Smith to review, a roomful of Delaware and California pleadings and analyses, all of my compilations. And the defendants did the same. David Bershad, a senior partner of my firm, who is the principal negotiator, had readied himself to be deposed by Mr.

Smith without any prior notification or even an explanation. The attorney from the Smith firm never arrived at any of our offices to review the documents. The deposition was canceled. Presumably they concluded that had we been allowed to create a record in accordance with Barkan and Amsted, this specter of collusion would have been dissipated. So they preferred the naked record, Professor Coffee's article written in 1991, and a lot of speechifying in court.

I think the significant thing is that when Mrs. Ruiz was asked in her testimony just [63] last week, "Do you have reason to believe that Mr. Schulman, in agreeing to this settlement on behalf of the class and proposing to the Court for its consideration -- do you have any reason to believe that Mr. Schulman is acting other than in good faith," the answer was, "No."

This is Mr. Smith's client, and he now comes to court in the face of that admission and accuses us of collusion.

Your Honor, I was very troubled about this case in 1991 when I appeared and argued vigorously and energetically before you in favor of the first settlement. I'm even more troubled now. I see a case in California that is dragging on, that has no real prospect for success, and I see a court in Delaware that I honor and respect, that gives jurisdiction and control of corporate litigation, that is a marvel throughout this country. And a key component of this process is that this Court will adjudicate the claims and it will settle them. It does so in an expeditious and a professional manner. And sophisticated practitioners in this area know that when a transaction is concluded and the litigation has received the proper hearing and the [64] parties are ready to settle and the Court can review it and determine whether the settlement is fair, the settlement must incorporate a global release of State and federal claims. Both state and federal courts have recognized that.

They are now seeking to hold that process up by siphoning and slivering themselves off into a California case, which they tell us -- promise us has merit but has consistently been rejected.

It is my appeal to this Court that it not go for these assertions by Mr. Smith which are unsubstantiated. He is simply attempting to hold up a settlement of this case which, on the objective evidence before it, is fair. And it is fair, I respectfully submit, your Honor, that it should be approved without any further delay. To do otherwise is to sacrifice the policy of settlement in this State.

Thank you very much, your Honor.

MR. RENAULD: May it please the Court: My name is David Renauld of Richards, Layton & Finger.

I'd like to introduce Mr. Paul Curnin of [65] Simpson Thacher in New York. We filed the papers for his admission pro hac vice this morning with the appropriate fee. With the Court's permission, he would like to make a couple comments.

MR. CURNIN: If I might only speak for a minute to the papers that Mr. Smith served about an hour before this hearing in connection with the notice and objection of Marian Minton.

We were served about 11:00 o'clock this morning some letters from Dean Witter that are characterized as affidavits, but they are not. They are merely letters written by someone who is not claiming to have any personal knowledge of this action. They apparently were obtained by subpoena a few days ago without notice to any of the parties in this action. Mr. Smith told us this morning he didn't have time to give us notice.

I think those materials should all be stricken from the record. There's nothing in those materials from the individual at Dean Witter who was personally involved in this case in either a letter or an affidavit, and there's no reason given for that omission.

Further, there's nothing in the letters [66] that Mr. Smith has filed that contradicts in any way the sworn affidavit filed by Alex Fan in this case, who was an individual with personal

knowledge and involvement in the mailing of the notice. His sworn affidavit is the only competent evidence before this Court on the issue of notice.

The undisputed facts regarding notice are simply as follows. None of them are disputed by Dean Witter. Dean Witter received the notice of pendency on November 27. That's the Exhibit C to Marian Minton's memorandum, a letter from Richard Dole of Dean Witter.

Pursuant to that same notice, Dean Witter had 14 days to contact Simpson Thacher if it wished more copies of the notice of pendency. Dean Witter failed to do so. In fact, by their own admission in the letters that Mr. Smith has submitted this morning, they didn't call Simpson Thacher for the first time until December 15. That's Dean Witter's negligence.

As stated in the Fan affidavit, the only competent evidence before your Honor on that point this morning, Mr. Fan and Shannon Strickland of Dean Witter exchanged two or three phone calls. [67] Those phone calls consisted of messages from Ms. Strickland asking Mr. Fan to return the call. Each time he failed promptly to do so. None of those messages were themselves requests for copies of the notice.

On December 23 Dean Witter sent by regular mail a list of shareholders to Simpson Thacher. They sent them regular mail. But notwithstanding the fact December 23 is the day before Christmas Eve, that cover letter of December 23 does not arrive at Simpson Thacher until December 28. Enclosed is a list of Dean Witter shareholders purportedly customers or stockholders of MCA.

Mr. Fan immediately calls Shannon Strickland and tells her that, "In light of the fact that you have given us a list of shareholders' names rather than mailing labels, it would probably be more expeditious for us to send you the 750 copies and have you mail them directly yourselves."

Ms. Strickland agreed, and Mr. Fan sent those notices out, 750 copies, by Federal Express that same day. Dean Witter

got them the next day. Then Dean Witter waited another eight days to bother [68] to mail those notices.

Mr. Smith said he's not interested in finding fault in the notice process. Small wonder, because the only fault here is Dean Witter's. The case law of this Court makes clear that a shareholder who elects the convenience of holding stock in street name bears all attendant risks. Mr. Smith's vague complaints about the way the system works notwithstanding, that's the law.

Add to this the fact that notice was published in the Wall Street Journal on November 18. The Fan affidavit stands uncontradicted by any competent evidence. There's absolutely no question that the notice was given in accordance with this Court's order of October 27.

Thank you.

MR. SMITH: Your Honor, may I just reply in about thirty seconds to two points?

THE COURT: If they are new, yes.

MR. SMITH: I would like to simply refer to the opt-out. I just would remind the Court that the opt-out feature is, by and large, illusory in light of the fact that it is well recognized that most people will not bother to opt out, and that [69] opt-out feature would destroy the class in California. Few people would bother to opt out.

Second, Mr. Schulman took us to task for the lack of substantive analysis in our briefs. I suggest that that's a little misplaced. I think if the Court bothers to read the briefs filed in the California federal litigation with the Ninth Circuit, this is where there is substantive analysis. To the extent the Court is concerned with substantive analysis, I saw little reason for simply rehashing in our objecting papers what is already very clearly stated in those briefs.

Finally, we did file an affidavit this morning by Kathleen Miller that had attached to it some exhibits. I simply wanted

to inform the Court that there was -- in our rush to get them out, what was identified as Exhibit A is really Exhibit B, and what was identified as Exhibit B is really Exhibit A. I apologize for that inconvenience.

Also, that Exhibit C to that affidavit is some excerpts from the deposition of Pamela de Ruiz. Those are submitted to the Court. I haven't said much about them, but I think if the Court troubles to read those you will see that [70] Mrs. de Ruiz is objecting in her own right, unlike the -- strike that.

Thank you, your Honor.

THE COURT: I'll reserve decision and advise counsel.

Stand in recess.

(Hearing concluded at 1:28 p.m.)

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[Certificate of authentication by Reporter omitted]

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CASE NO. 11740 CASE FILE LISTING

* * *

SHORT PLAINTIFF CAPTION

IN RE MCA INC. SHAREHOLDERS LITIGATION

LONG PLAINTIFF CAPTION

SEYMOUR LAZAR, A.J. LOU, MARION LORD, SHELDON SHORE AND HARRY OSGOOD.

LONG DEFENDANT CAPTION

MCA INC., LEW R. WASSERMAN, THOMAS V. JONES, ROBERT S. STRAUSS, THOMAS WERTHEIMER, HOWARD H. BAKER, JR., THOMAS P. POLLOCK, FELIX G. ROHATYN, SIDNEY JAY SHEINBERG, HOWARD F. ALLEN, MARY GARDINER JONES, AND CHARLES S. PAUL.

DOCKET ENTRIES

1	09/26/90	COMPLAINT FOR BREACH OF FIDUCIARY DUTIES, JOSEPH ROSENTHAL ATTY. FOR PLTS.
1	09/26/90 72	REACTIVATE DOCKET ENTRIES #1 THROUGH #103 INCLUSIVE
2	09/26/90	MOTION & ORDER FOR SPECIAL PROCESS SERVER SIGNED BY V.C. BER DTD.09-26-90 - FILED

DOCKET ENTRIES

3	09/27/90	ISSUED SUMMONS TO SPEC.PROC.SERVER 1 COPY SHR. RET: SERVED MCA INC. BY LEAVING COPIES WITH ELLEN KINSLER OF CORP TRUST CO. ON 09/27/90
4	09/27/90	ISSUED 3114 SUMMONS TO SPEC.PROC.SERVER 11 COPIES SHR.RET: SERVED ALL INDIVIDUALS BY LEAVING COPIES WITH ELLEN KINSLER OF CORP. TRUST CO. ON 09-27-90
5	09/27/90	PLTS. FIRST REQUEST FOR PRODUCTION OF DOCUMENTS FROM ALL DEF
6	09/28/90	LTR. TO MASTER KIGER FROM JOSEPH ROSENTHAL DTD.09-28-90 - FI
7	10/01/90	REGISTER'S CERTIFICATE - FILED
8	10/03/90 22	ORDER OF CONSOLIDATION SIGNED BY CH.ALLEN DTD.10-02-90, FOR ALL PURPOSES, ALL PAPERS TO BE FILED IN C.A.11740 - FILED
9	11/07/90	LTR. TO CH.ALLEN FROM JOSEPH ROSENTHAL DTD.11-06-90 - FILED
10	11/08/90	SUPPLEMENTAL ORDER TO ORDER ON CONSOLIDATED SIGNED BY CH. ALLEN DTD.11-08-90 (ELFRIEDE GLANCY, JACOB GOTTLIEB & C. CHRISTOPHER MUTH TRUSTEE FOR THE CARL H. MUTH TRUST ARE HEREBY ADDED AS PARTIES PLT.) - FILED

DOCKET ENTRIES

11	11/16/90	ANSWER (MARTIN P. TULLY ATTY. FOR DEFS. MCA INC., LEW R. WASSERMAN, ET AL) - FILED
12	11/27/90	LTR. TO V.C. HARTNETT FROM JOSEPH ROSENTHAL DTD.11-27-90 - FILED
13	11/29/90	LTR. TO COUNSEL FROM V.C. HARTNETT DTD.11-27-90, RE: HEARING SCHEDULED 12-20-90, AT 11:00 A.M. IN DOVER, IF I DECIDE IT SHOULD BE HEARD AFTER RECEIVING THE PAPERS - FILED
14	11/30/90	LTR. TO V.C. HARTNETT FROM JOSEPH ROSENTHAL DTD.11-30-90 -- FILED
15	11/30/90	ISSUED SUBPOENA DUCES TECUM 1 COPY RET: SERVED PARAMOUNT COMMUNICATIONS, INC. BY LEAVING COPIES WITH LORI DENKENBERGER OF PRENTICE-HALL CORP. ON 11-30-90.
16	11/30/90	NOTICE OF DEPOSITION - FILED
17	12/05/90	LTR. TO JOSEPH ROSENTHAL FROM V.C.HARTNETT DTD.11-30-90, RE: YOU HAVE NOT SHOWN, OR EVEN ATTEMPTED TO SHOW, THE GOOD CAUSE REQUIRED BY CHANCERY RULE 5(G), EFFECTIVE 09-01-90 - FILED

DOCKET ENTRIES

18	12/05/90	LTR. TO COUNSEL FROM V.C.HARTNETT DTD.11-30-90, RE: IT HAS BECOME NECESSARY TO CHANGE THE DATE & TIME WHICH IS 12-18-90, AT 11:00 A.M. IN WILMINGTON - FILED
19	12/10/90	LTR. TO V.C.HARTNETT FROM MARTIN P. TULLY DTD. 12-07-90 - FILED
20	12/10/90	AFFIDAVIT OF ROBERT D. HADL - FILED
21	12/10/90	STIP. & PROP. ORDER FOR PROTECTION PURSUANT TO COURT OF CHANCERY RULE 5(G) GOVERNING CONFIDENTIAL MATERIAL. ORDER RETURNED UNSIGNED ON 12-19-90
22	12/12/90	STIP. & PROTECTIVE ORDER PURSUANT TO COURT OF CHANCERY RULE 5(G) GOVERNING CONFIDENTIAL MATERIAL SIGNED BY V.C.HARTNETT DTD. 12-10-90 - FILED
23	12/13/90	LTR. TO V.C. HARTNETT FROM JOSEPH ROSENTHAL DTD. 12-13-90 - FILED
24	12/14/90	AMENDED STOCKHOLDERS' CLASS ACTION COMPLAINT - FILED
25	12/18/90	LTR. TO V.C. HARTNETT FROM JOSEPH ROSENTHAL DTD. 12-18-90 - FILED

DOCKET ENTRIES

26	12/18/90	STIP.& AGREEMENT OF COMPROMISE & SETTLEMENT - FILED
27	12/19/90	ORDER AS TO SETTLEMENT PROCEEDINGS SIGNED BY V.C. HARTNETT DTD. 12-18-90 (HEARING SCHEDULED 01-30-91, AT 11:00 A.M.)
28	12/28/90	LTR. TO COUNSEL FROM V.C. HARTNETT DTD. 12-19-90 RE: SETTLEMENT HEARING SET FOR 1-30-91 AT 11:00 A.M. IN WILMINGTON
29	01/14/91	NOTICE OF LODGING - FILED
30	01/14/91	DEPOSITION & EXHIBITS OF HOWARD P. ALLEN TAKEN 12-05-90, SIDNEY SHEINBERG TAKEN 12-06-90, LEW R. WASSERMAN TAKEN 12-06-90 (FILED UNDER SEAL) - FILED
31	01/14/91	DEPOSITIONS & EXHIBITS OF HOWARD P. ALLEN TAKEN 12-05-90, SIDNEY SHEINBERG TAKEN 12-06-90, LEW R. WASSERMAN TAKEN 12-06-90 (FILED UNDER SEAL) - FILED
32	01/14/91	DEPOSITIONS & EXHIBITS OF HOWARD P. ALLEN TAKEN 12-05-90, SIDNEY SHEINBERG TAKEN 12-06-90, LEW R. WASSERMAN TAKEN 12-06-90 (FILED UNDER SEAL) - FILED

DOCKET ENTRIES

33	01/14/91	DEPOSITIONS & EXHIBITS OF HOWARD P. ALLEN TAKEN 12-05-90, SIDNEY SHEINBERG TAKEN 12-06-90, LEW R. WASSERMAN TAKEN 12-06-90 (FILED UNDER SEAL) - FILED
34	01/23/91	NOTICE OF INTENT TO APPEAR & OBJECT (DAVID & ANDREW MINTON)
35	01/23/91	MEMO. OF OBJECTORS DAVID MINTON & ANDREW MINTON IN OPPOSITION TO THE PROPOSED SETTLEMENT - FILED
36	01/23/91	EXHIBITS TO MEMO. OF OBJECTORS DAVID MINTON & ANDREW MINTON IN OPPOSITION TO THE PROPOSED SETTLEMENT - FILED
37	01/28/91	CERTIFICATE OF SERVICE (JOSEPH ROSENTHAL) - FILED
38	01/28/91	LTR. TO V.C. HARTNETT FROM JOSEPH ROSENTHAL DTD. 01-28-91
39	01/28/91	AFFIDAVIT IN SUPPORT OF PROPOSED SETTLEMENT & AWARD OF ATTY FEES & EXPENSES (STEVEN G. SCHULMAN) - FILED
40	01/28/91	AFFIDAVIT OF HENRY A. BRACHTL - FILED
41	01/28/91	AFFIDAVIT OF ARTHUR S. AINSBERG - FILED

DOCKET ENTRIES

42	01/29/91	LTR. TO V.C. HARTNETT FROM MARTIN P. TULLY DTD. 01-29-91 - FILED
43	01/29/91	MEMO OF DEFS. IN SUPPORT OF PROPOSED SETTLEMENT & IN OPPOSITION TO OBJECTIONS - FILED
43	01/30/91	SETTLEMENT HEARING & ATTYS. FEES HELD BEFORE V.C. HARTNETT, DEC: RESERVED TIME: 11:08-1:01.
44	02/05/91	REPORTER'S TRANSCRIPT OF PROCEEDINGS PLTS' MOTION FOR SUMMARY JUDGMENT TAKEN 12-28-90 - FILED
45	02/05/91	MOTION & ORDER FOR ADMISSION PRO HAC VICE SIGNED BY V.C. HARNETT DTD. 01-30-91 (PAUL K. ROWE) - FILED
46	02/05/91	MOTION & ORDER FOR ADMISSION PRO HAC VICE SIGNED BY V.C. HARNETT DTD. 01-30-91 (STANLEY WOLFE) - FILED
47	02/05/91	MOTION & ORDER FOR ADMISSION PRO HAC VICE SIGNED BY V.C. HARNETT DTD. 01-30-91 (MARK C. GARDY) - FILED
48	02/05/91	MOTION & ORDER FOR ADMISSION PRO HAC VICE SIGNED BY V.C. HARNETT DTD. 01-30-91 (STEVEN G. SCHULMAN) - FILED

DOCKET ENTRIES

49	02/05/91		MOTION & ORDER FOR ADMISSION PRO HAC VICE SIGNED BY V.C. HARNETT DTD. 01-30-91 (MAY KAY VYSKOCIL) - FILED
50	02/05/91		AFFIDAVIT OF MAILING (PAUL K. ROWE) - FILED
51	02/05/91		PLTS. MEMO OF LAW IN SUPPORT OF PROPOSED SETTLEMENT, IN RESPONSE TO OBJECTION, & IN SUPPORT OF APPLICATION FOR ATTY. FEES AND EXPENSES - FILED
52	02/05/91		AFFIDAVIT OF CRAIG B. SMITH - FILED
53	02/19/91		TRANSCRIPT OF SETTLEMENT HEARING TAKEN 01-30-91 - FILED
53	03/05/91	50	STATUS LTR. FROM JOS. ROSENTHAL
54	04/25/91		OPINION FROM V.C. HARTNETT DTD.04-22-91, RE: DENIAL OF PROPOSED SETTLEMENT OF CLASS ACTION IT IS SO ORDERED - FILED
54	02/19/92	50	(3) STATUS LTRS.
55	10/22/92		STIP. & AGREEMENT OF COMPROMISE & SETTLEMENT - FILED
56	11/04/92		SCHEDULED 01-21-93, AT 12:00 NOON) - FILED

DOCKET ENTRIES

57	12/11/92	LTR. TO V.C. HARTNETT FROM CRAIG B. SMITH DTD. 12-11-92 - FILED
58	12/11/92	NOTICE OF INTENT TO APPEAR & OBJECT - FILED
59	12/11/92	NOTICE OF MOTION & PROP. ORDER FOR LEAVE TO TAKE DISCOVERY
59	12/24/92	RETURNED UNSIGNED 12-24-92 - FILED
60	12/16/92	NOTICE OF SERVICE (PLTS. FIRST DOCUMENT REQUEST DIRECTED TO OBJECTOR) - FILED
61	12/16/92	NOTICE OF DEPOSITION - FILED
62	12/17/92	WITHDRAWAL OF REQUEST TO TAKE DISCOVERY - FILED
63	12/30/92	NOTICE OF SERVICE OF OBJECTOR'S RESPONSE TO PLTS.' FIRST DOCUMENT REQUEST
64	12/31/92	[unintelligible] TO APPEAR AND OBJECTIONS TO PROPOSED SETTLEMENT
65	12/31/92	PAMELA MINTON DE RUIZ A/K/A PAMELA MANLEY'S NOTICE OF INTENT TO APPEAR AND OBJECT
66	12/31/92	MEMORANDUM OF MARION MINTON AS CUSTODIAN FOR KATHERINE MINTON
67	12/31/92	MEMORANDUM OF OBJECTOR PAMELA MINTON DE RUIZ IN OPPOSITION TO THE PROPOSED SETTLEMENT

DOCKET ENTRIES

68	12/31/92	AFFIDAVIT OF WILLIAM A. KRUPMAN
69	01/05/93	NOTICE OF SERVICE (PLTS. FIRST DOCUMENT REQUEST DIRECTED TO OBJECTOR PAMELA MINTON DE RUIZ) - FILED
70	01/05/93	NOTICE OF DEPOSITION - FILED
71	01/08/93	NOTICE OF SERVICE (PLTS. FIRST DOCUMENT REQUEST DIRECTED TO OBJECTOR WILLIAM KRUPMAN) - FILED
72	01/14/93	ISSUED SUBPOENA DUCES TECUM 1 COPY RET:
72	01/15/93	SERVED DEAN WITTER REYNOLDS, INC. LEAVING COPIES WITH BONNIE BORSA ON 01-14-93.
73	01/19/93	CERTIFICATE OF SERVICE (KEVIN GROSS) - FILED
74	01/19/93	PLTS. MEMO. IN SUPPORT OF REQUEST FOR AWARD OF ATTYS. FEES AND ALLOWANCE OF EXPENSES - FILED
75	01/19/93	PLTS. MEMO. IN SUPPORT OF PROPOSED SETTLEMENT - FILED
76	01/19/93	APPENDIX IN SUPPORT OF PLTS. APPLICATION FOR APPROVAL OF SETTLEMENT & AWARD OF ATTYS. FEES - FILED
77	01/19/93	DECLARATION OF STEVEN G. SCHULMAN - FILED

DOCKET ENTRIES

78	01/19/93	LTR. TO COUNSEL FROM V.C. HARTNETT DTD. 01-14-93, RE: EACH SIDE LIMITED ONE-HALF HOUR AT THE HEARING ON 01-21-93 - FILED
79	01/19/93	MEMO. OF DEFS. IN SUPPORT OF REVISED SETTLEMENT & IN OPPOSITION TO OBJECTIONS - FILED
80	01/19/93	AFFIDAVIT OF MARTIN P. TULLY - FILED
81	01/19/93	AFFIDAVIT OF ALEXANDER FAN - FILED
82	01/19/93	AFFIDAVIT OF MAILING (PAUL C. CURNIN) - FILED
83	01/19/93	NOTICE OF LODGING - FILED
84	01/19/93	TELEPHONIC DEPOSITION & EXHIBITS OF PAMELA MINTON DE RUIZ TAKEN ON 01-14-93 - FILED
85	01/19/93	DEPOSITION & EXHIBITS OF MARION MINTON TAKEN 01-06-93 - FILED
86	01/21/93	STIP. & PROP. ORDER FOR ADMISSION PRO HAC VICE (PAUL C. CURNIN)
86	01/21/93	ORDER SIGNED BY V.C. HARTNETT DTD. 01-21-93
87	01/21/93	MOTION & PROP. ORDER FOR ADMISSION PRO HAC VICE (JAMES H. ALLYN)

DOCKET ENTRIES

87	01/21/93	ORDER SIGNED BY V.C. HARTNETT DTD. 01-21-93
88	01/21/93	DECLARATION OF PETER R. DION KINDEM - FILED
89	01/21/93	AFFIDAVIT OF KATHLEEN M. MILLER - FILED
90	01/21/93	ERRATA SHEET ON DEPOSITION OF PAMELA MINTON DE RUIZ - FILED
91	01/20/93	LTR. TO V. C. HARTNETT FROM JOSEPH ROSENTHAL DTD. 01-19-93 - FILED
92	01/20/93	LTR. TO V. C. HARTNETT FROM JOSEPH ROSENTHAL DTD. 01-20-93 - FILED
92	92 01/21/93	SETTLEMENT HEARING/ATTYS. FEES HELD BEFORE V.C. HARTNETT, DEC: RESERVED, TIME: 12:05-1:29.
93	02/02/93	LTR. TO V.C. HARTNETT FROM JOSEPH ROSENTHAL DTD. 02-02-93 - FILED
94	02/02/93	NOTICE OF MOTION, MOTION & ORDER FOR APPROVAL TO FILE SUPPLEMENTAL MEMO.
94	02/02/93	ORDER RETURNED UNSIGNED [unintelligible] 08-93
95	02/02/93	SUPPLEMENTAL MEMO. IN SUPPORT OF REVISED SETTLEMENT & IN OPPOSITION TO OBJECTIONS - FILED

DOCKET ENTRIES

96	02/11/93	LTR. TO COUNSEL FROM V.C. HARTNETT DTD. 02-08-93, RE: PLTS. MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MEMO. THAT WAS FILED TEN DAYS AFTER THE HEARING HAD BEEN ADJOURNED IS NOT TIMELY & IS DENIED
97	02/12/93	TRANSCRIPT OF ARGUMENT ON PLTS. APPLICATION FOR APPROVAL OF SETTLEMENT & ATTYS/FEES TAKEN 01-21-93 - FILED
98	02/16/93	MEMO. OPINION FROM V.C. HARTNETT DTD. 02-12-93, RE: APPROVAL OF SETTLEMENT OF A CLASS ACTION, THE SETTLING PARTIES SHALL SUBMIT AMENDED PROPOSED ORDER - FILED
99	02/18/93	LTR. TO V.C. HARTNETT FROM JOSEPH ROSENTHAL DTD. 02-17-93
100	02/18/93	PROP. ORDER & FINAL JUDGMENT
100	02/18/93	ORDER RETURNED UNSIGNED ON 03-02-93
101	02/23/93	ORDER & FINAL JUDGMENT SIGNED BY V.C. HARTNETT 02-22-93
102	03/24/93	OBJECTORS DAVID MINTON'S & ANDREW MINTON'S APPLICATION FOR ATTYS. FEES - FILED

DOCKET ENTRIES

103	03/24/93	AFFIDAVIT OF CRAIG B. SMITH - FILED
104	03/31/93	LTR. TO REGISTER FROM CATHY L. HOWARD DTD. 03-29-93 - FILED
105	03/31/93	NOTICE OF APPEAL - FILED
106	04/12/93	OBJECTOR WILLIAM KRUPMAN'S APPLICATION FOR ATTORNEYS' FEES
107	04/12/93	AFFIDAVIT OF JAMES H. ALLYN
108	04/16/93	LTR. TO V.C. HARTNETT FROM KATHLEEN M. MILLER DTD. 04-16-93
109	04/16/93	NOTICE OF WITHDRAWAL OF MOTION (APPLICATION FOR ATTYS. FEES)
110	04/20/93	RECEIPT FROM MARGARET L. NAYLOR DTD. 04-13-93 - FILED
111	04/30/93	LTR. TO V.C. HARTNETT FROM JAMES H. ALLYN DTD. 04-27-93 - FILED
112	04/30/93	NOTICE OF WITHDRAWAL OF MOTION (APPLICATION FOR ATTYS. FEES FROM OBJECTOR WILLIAM A. KRUPMAN) - FILED
113	06/14/93	LTR. TO REGISTER FROM MARGARET L. NAYLOR DTD. 06-10-93 - FILED (APPELLANTS APPENDIX PAGES A-155 THROUGH A-159)

CORPORATE SECURITIES

John C. Coffee Jr.

Suspect Settlements in Securities Litigation

MUCH LIKE THE production of sausage and legislation, the settlement of securities litigation is a process that the high-minded are best advised not to examine too closely. For some time, commentators have recognized that serious principal/agent problems compromise the utility of shareholder litigation as a mechanism for deterring managerial misconduct.[1] Sometimes, the result can be collusive settlements in which low recoveries are exchanged for high plaintiffs' attorneys fees. But, while anecdotal evidence has always been available that corroborated this pattern, aggregate statistical data has generally been lacking. Now, however, it has begun to emerge in two recent studies by professors at Yale and Stanford Law Schools.[2] At the same time, greater judicial awareness of the potential for collusive settlements is also creeping into judicial opinions -- particularly in a string of recent cases that have explicitly abandoned the lodestar method of compensating the plaintiff's attorney in class and securities litigation.[3]

A Subtle Process

Collusion is, however, a complex phenomenon. It does not occur through naked exchanges of low recoveries for high fees, but by subtler processes that produce settlements not based on an action's litigation merits. Thus, for the litigator, the most interesting recent development in securities litigation may be the appearance of a new technique by which a collusive settlement -- that is, a non-adversarial settlement that maximizes the attorney's interests at the expense of the client's -- can be negotiated. Last month, the First Circuit Court of Appeals ruled in *Nottingham Partners v. Trans-Lux Corporation*[4] that a class action brought in federal court for securities law violations

was barred by the settlement of a later-filed state class action, even though the state class action did not (and could not) raise any securities law claims.[5]

Because the general release issued to the defendants in the state court settlement resulted in issue preclusion, the consequence was that no court, state or federal, could hear plaintiffs' claims of proxy fraud. The seeming paradox in *Nottingham Partners* is that a state court settlement can have preclusive effect despite the fact that the state court lacked subject matter jurisdiction over the claims thereby barred.

WHILE THE LEGAL issue of when one court has the power to approve the release of claims pending in another forum is complex, the practical message to plaintiffs' counsel is much simpler: weak derivative and class action claims that once would have been routinely dismissed by the Delaware Chancery Court now have an enhanced settlement value, because they can confer immunity with respect to pending federal securities class actions, which often would have a significant settlement value.

Ironically, the incentives for defendants are even clearer: never seek dismissal on the merits of a state class action if a companion federal class action raising related federal claims is possible, but instead reach a settlement in which the defendants are given a general release. If properly structured to fall within the *Nottingham Partners* precedent, such a release will preclude a federal class action raising federal securities claims.

This type of settlement can be described as "collusive" because the parties to the state court settlement are effectively depriving absent players -- the plaintiffs and their attorneys in the federal action -- of their day in court. The net result is effectively both a wealth transfer from the federal plaintiffs' attorneys to the state plaintiffs' attorneys and a reduction in the total recovery to the class (because

the state plaintiffs' attorneys are settling federal claims that they can never win, but can only settle, and should thus accept a lesser settlement than would the federal plaintiffs' attorneys).

Although it is still premature to predict that Rule 10b-5 actions will become an endangered species, the possible end result of *Nottingham Partners* will be that the already well-travelled road to the Delaware courts could become a six lane highway as plaintiffs and defendants rush to settle there before a federal court can stay them. This column will analyze the inter-jurisdictional race to the courthouse that *Nottingham Partners* opens up -- after first surveying the new empirical research on the settlement stage in securities litigation.

The Settlement Stage

To study shareholder litigation, Professor Roberta Romano of Yale Law School developed a sample of 535 public corporations, randomly chosen from the New York Stock Exchange, NASDAQ and from firms that delisted from those markets.[6] Studying these firms from 1966 through 1987, she identified 139 shareholder actions (both class actions and derivative suits) against 99 firms. While the incidence of litigation was low (NYSE firms could expect to be sued only once every 42 years on this basis), she found a substantial rise in litigation frequency during the 1980s.[7]

Her disposition data confirms earlier studies: plaintiffs rarely win, but most actions do settle. In fact, 65 percent of these actions settled, but only in two suits (1.5 percent of her total sample) did plaintiffs win a judgment. This translates into a 6 percent success rate for plaintiffs in terms of cases reaching court adjudication.[8] Shareholder settlements, she concluded, had two striking features: First, only half of all settlements involved a monetary recovery (46 of 83). Second, fee awards were paid to plaintiffs attorneys in over 90 percent of her cases (75 of 83), even though the plaintiffs received a monetary recovery in only

around half.[9] Indeed, in seven cases (8 percent), the only relief was plaintiff attorney's fees.[10]

A much criticized aspect of shareholder litigation has been the use of nonpecuniary settlements that afford no monetary relief to the shareholders or corporation, but which are used to justify an award of plaintiffs' attorneys fees. Critics have not infrequently suggested that such relief is often cosmetic and intended largely to hype the value of the settlement to justify a fee award.[11] In her sample, Professor Romano found 25 settlements affording structural relief, but only four of these had a monetary recovery.[12] She concluded that the value of such structural relief seemed "inconsequential," and "for the most part, board composition changes are cosmetic."[13] Meanwhile, attorneys fees and expenses, which were awarded in 75 cases in her study, averaged $908,808.[14]

Professor Romano's data suggest that the problem of collusion is considerably more pronounced in derivative actions than in class actions. The average recovery in derivative actions ($6,056,172) was about half that in class actions ($10,948,279), and a cash payout to shareholders occurred in only 21 percent of derivative actions, but in 67 percent of class actions.[15] Attorneys' fees were also lower in derivative actions ($394,771) than in class actions ($1,476,596),[16] which may reflect a judicial estimate of the lower value of the plaintiffs' attorneys' services in derivative suits.

Some may interpret this data to mean that derivative suits are largely frivolous. Others may see this data as showing that the procedural obstacles (in particular, the demand rule) have been placed so high in Delaware as to make even meritorious cases unwinnable. As a result, plaintiffs can hope only to achieve a small settlement. Yet, what both sides in this debate must recognize is that settlement (not adjudication) is the primary mode of resolution. Moreover, courts seem unable to play more than a weak monitoring role in supervising this stage, because settlements providing

little discernible benefit to the corporation or its shareholders frequently pass judicial muster.

The pressures to settle are particularly strong in derivative actions for two reasons: First, corporate law generally forbids the indemnification of litigation expenses if the corporate official is adjudicated to have breached a duty owed to the corporation, and D&O insurance contains exclusions for fraud or dishonesty which are more likely to be applicable if the action is resolved through a judgment than if it is settled.

Second, defense counsel maintains that a substantial cost differential favors plaintiff's attorneys, who can carry the action forward at low cost to themselves while imposing high costs on the defendants (and ultimately the corporation). On this theory, even a cosmetic settlement is in the corporation's best interests in order that it avoid the expenses to which the plaintiff can subject it.

The problem with this latter claim is the usual one with justifications for submitting to extortion: Once one is known not to resist, one becomes the target for more litigation. Indeed, the Romano study provides some suggestive, if inconclusive, support for this hypothesis: 29 percent of the firms that were sued in her study accounted for roughly half of all suits.[17] Moreover, those firms that were exposed to multiple suits did appear to settle at a marginally higher rate, and firms that were sued only once appear to have settled at a lower monetary recovery than those that were repetitively sued. Although these results were not statistically significant, the hypothesis that firms that settle easily are recurrently sued is at least consistent with this data.

Although the pressures to settle are more intense in the derivative suit context (and the value of the relief to the corporation justifying the award of attorneys' fees correspondingly more suspect), similar problems are evident in securities class actions. Indeed, a 1991 study of securities class actions by Professor Janet Cooper

Alexander of Stanford Law School casts even more doubt on whether the settlement process leads to outcomes that reflect the action's merits.[18]

Studying a specially selected sample of securities class actions involving computer-related initial public offerings during the first half of 1983, she discovered that (1) every single company in the industry whose stock declined in the six months following its initial public offering was sued, and (ii) the resulting cases uniformly settled for approximately one-quarter of the potential damages.[19] As a result, she concludes that "the strength of the plaintiffs' case on the merits did not appear to be a significant factor in determining the outcome" of the cases she studied.[20]

Why are the merits and the likely outcome at trial seemingly irrelevant to the settlement award? Professor Alexander points to a variety of factors: extremely risk-averse defendants, astronomic potential damages, the lodestar formula for awarding attorneys fees, and the existence of legal rules governing insurance and indemnification that encourage the parties to settle on any basis, rather than go to trial.

For example, a plaintiff's attorney who is compensated on a contingent hourly basis and who has invested a year or more in the preparation of an action has little, if any, economic reason to go to trial, when the potentially higher recovery to the class at trial will not substantially benefit him (because it will add only marginally to the hours that can be billed under the lodestar formula).

Professor Alexander's thesis is a provocative and radical one that contradicts the standard "law and economics" orthodoxy, which assumes that the parties to litigation settle based on their rational estimates of the expected outcome at trial.[21] Still, she may overstate. What she describes as the irrelevance of the merits may in fact be better described as the consequence of a unique statutory tilt toward the plaintiff in the Securities Act of 1933.

In effect, the statutory law has made the usual factual merits irrelevant. Because initial public offerings are governed by Section 11 of the Securities Act of 1933, which places the burden on most defendants to prove non-negligence and holds the issuer strictly liable for any material misstatement or omission, there may be few legitimate issues for a trial to resolve.

In this light, the governing formula she describes under which all securities class actions are settled at 25 percent of their requested damages may simply reflect defendants' judgment that these cases are unwinnable; the settlement then is largely derived by discounting the damage claim by the time value of money over the interval between the actual settlement date and the future point at which a trial would eventually award full damages to the plaintiffs.

As she acknowledges, the Securities Act of 1933 may give plaintiffs a virtual "put" for the period of the statute of limitations, enabling them to exchange their securities for their original purchase price. If so, the problem lies less with the settlement system than with the substantive law, itself, which in this unique area arguably tilts excessively in the direction of the plaintiff.

These two studies by Professors Romano and Cooper point in opposite directions. The Romano study suggests that stockholder litigation produces scant benefits for shareholders, while the Cooper study seemingly finds that securities class actions produce excessive and unjustified benefits. While defendants may agree with each of their critiques, they cannot both be right across the board: the problem cannot simultaneously be that stockholders get too little and too much. Still, both their stories have one plausible theme in common: the settlement process is not working.

Faces of Collusion

As traditionally understood, a collusive settlement was one in which the plaintiffs' attorneys sell out their clients in return for an overly generous fee award. The Romano study supports this traditional understanding of the problem. In contrast, the Cooper study suggests that defendants can also collude, by passing the costs of the settlement on to different absent parties: namely, the insurers, or the indemnifying corporation. Conceptually, the process is the same: the immediate participants maximize their interests at the expense of the absent parties.

Today, there may be a third form of collusion appearing on the horizon. Under it, the parties to one action (in state court) negotiate a non-merits based settlement in which at least one of defendants' primary goals is to preclude plaintiffs in a different case (in federal court). In short, one group of plaintiffs' attorneys effectively sell the legal claims raised by another group in order to enhance their own settlement at the expense of the absent group. This is the problem raised by *Nottingham Partners*.[22]

In March 1986, Trans-Lux issued a proxy statement whereby it sought to a adopt a series of "shark repellent" charter amendments. Shortly after these charter amendments were approved, Trans-Lux announced a sale of 24 of its movie theaters for $15 million.

Two years later, the plaintiffs in *Nottingham* brought suit in federal court, alleging that the non-disclosure of the impending sale violated Rule 14a-9 because its announcement in the proxy statement would have effectively put Trans-Lux on the auction block and caused shareholders to reject the proposed shark repellents.

Shortly thereafter, a parallel class action was filed in Delaware Chancery Court, asserting various violations of state law (including disclosure shortcomings in the 1986 proxy statement).[23] Within three months of its filing, a proposed settlement was reached in the Delaware action,

and, not surprisingly, it provided for a non-pecuniary settlement (but also for the payment of relatively modest plaintiffs' attorneys fees of $120,000).[24] The federal plaintiffs objected to the settlement, but the Delaware Chancery Court certified the class, overruled their objections, and approved the settlement.

On appeal, the federal plaintiffs also raised an important constitutional argument before the Delaware Supreme Court: that due process entitled them to an opportunity to opt out of the Delaware class action[25] In *Phillips Petroleum Co. v. Shutts*,[26] the Supreme Court held in 1985 that before a state court may bind an absent plaintiff in a class action "concerning a claim for money damages or similar relief at law," it must provide such a plaintiff "with an opportunity to remove himself from the class action by executing and returning an 'opt-out' or 'request for exclusion' form to the court.[27] Yet, on appeal, the Delaware Supreme Court distinguished *Shutts* by finding that the right to opt out did not apply to a class action that primarily sought equitable or injunctive relief, even if the action also sought monetary relief.[28] In such circumstances, it said, the Chancery Court could permit opting out as a discretionary matter, but was under no obligation to do so.[29]

When Trans-Lux thereafter pleaded the release given to it in the Delaware settlement as a defense to the federal action, the district court and later the First Circuit agreed with the Delaware Supreme Court's analysis.[30] Other decisions have similarly found that the right to opt out does not apply to class actions primarily seeking injunctive relief.[31] Yet, in sharp contrast to Delaware, the New York Court of Appeals has ruled this year that, although no right to opt out need be given from that portion of a class action seeking injunctive relief, a plaintiff must be permitted to opt out with respect to its claim for monetary relief.[32]

While New York's rule is constitutionally sounder, Delaware's approach poses a major hurdle for securities plaintiffs, because it is easily manipulated. Indeed, the facts

of the Trans-Lux litigation illustrate this potential for abuse in the artificiality of the equitable relief sought in that case.

Plaintiffs in the state action sought an injunction cancelling Trans-Lux's charter amendments two years after their adoption, when the issue of the possible sale of the company was long since moot. If this is sufficient to characterize a class action as primarily equitable in character, then even plaintiffs who have filed an earlier action for monetary damages in federal court are in trouble, because a Delaware action can always be brought for injunctive relief and will predictably settle quickly in order to be used as a barrier to the federal action.

For the federal plaintiffs in such a case, the exceedingly difficult procedural issue will be whether to seek the right to opt out in Delaware (which is discretionary with the Delaware court) or to avoid Delaware entirely and later claim in federal court that they were not adequately represented in the Delaware action.[33] But so long as the state court action involves an "identical operative factual predicate"[34] (which in securities cases will be the norm when both actions allege disclosure violations), it is now the law that claims over which a federal court has exclusive jurisdiction may be released in state court. At this point, at least until the Supreme Court clarifies *Shutts*, the prospect for collusion is clear and present.

Conclusion

Many courts have unthinkingly uttered the "familiar axiom that a bad settlement is almost always better than a good trial."[35] This column has contended that not only is this assertion shallow at best, but it is coming to mask a basic failure in securities litigation. The prospects for reform will be the focus of my next column.

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1. I have surveyed this literature elsewhere at length. See Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669 (1986); Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigations*, 48 Law & Contemp. Problems 5. For more recent articles criticizing the settlement process and the adequacy of judicial approval of class and derivative actions as a safeguard, see Resnik, *Judging Consent*, 1987. U. Chi. Legal F. 43, 101 ("judges are ill-equipped to do much other than nod when the litigants join together and seek court approval"); Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syracuse L. Rev. 709, 739 (1989); Note, *Abuse in Plaintiff Class Action Settlements*, 84 Mich. L. Rev. 308 (1985).

2. See Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991); Romano, The Shareholder Suit: Litigation Without Foundation? (May 1990 forthcoming).

3. For recent cases rejecting the lodestar in favor of a return to a percentage-of-the-recovery system, see *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-56 (10th Cir. 1988); *Bebchick v. Washington Metro. Area Transit Comm.*, 805 F2d 396 (D.C. Cir. 1986); *In re Chrysler Motors Corp. Overnight Eval. Prog. Litig.*; 736 F. Supp. 1007 (E.D. Mo. 1990); *In re Activision Securities Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989); *Mashburn v. National Health Care Inc.*, 684 F. Supp. 679 (M.D. Ala. 1988). For a related decision seeking to preclude the parties from using a "clear sailing" agreement under which no challenge to plaintiffs' attorneys' fees will be made, see *Weinberger v. Great Northern Nekroosa Corp.*, 59 L.W. 2514 (1st Cir. Feb. 11, 1991).

4. 1991 U.S. App. LEXIS 1679 (1st Cir. Feb. 7, 1991).

5. Section 27 of the Securities Exchange Act of 1934 gives federal courts exclusive jurisdiction over "violations of this title or the rules and regulations thereunder," including, of course, Rule 10b-5.

6. See Romano, supra note 2.

7. Id. at 9-11. She attributes this increase in litigation frequency to the acquisition boom of the 1980s. Prior to 1980, she found only eight acquisition-related actions, but 46.5 such actions since then (or 40 percent of her total sample).

8. Id. at 18-21. Earlier empirical studies found a similar relationship between a high rate of settlements and few plaintiff victories. See Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits, 1971-1978*, 60 Boston Univ. L. Rev. 542 (1980).

9. Romano, supra note 2, at 21.

10. *Id.*

11. See, *e.g.* Aronoff and Freeman, "Shareholder Derivative Actions -- A Continuing Balancing Effort," *Nat'l Law Journal* 28 (Nov. 16, 1981).

12. Romano, supra note 2, at 25.

13. *Id.*

14. *Id.* at 28. Where there was a monetary settlement fund, the attorneys' fees rose to $1,453,096, but where only structural relief or other nonpecuniary relief was obtained, they fell to $286,765. *Id.* This pattern strongly suggests that courts also doubted the value of this relief.

15. *Id.* at 22.

16. *Id.* at 28.

17. *Id.* at 12.

18. Alexander, supra note 2.

19. *Id.* at 500.

20. *Id.*

21. See, e.g., Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 4 (1964); Cooter and Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. Econ. Literature 1067 (1989).

22. See note 4 supra.

23. See *Nottingham Partners v. Dana*, 564 A.2d 1089, 1092 (Del. 1989).

24. *Id.* at 1093.

25. *Id.* at 1097-1101.

26. 472 U.S. 797 (1985).

27. *Id.* at 811-12.

28. 564 A.2d at 1098-1101.

29. *Id.* at 1101.

30. See *Nottingham Partners v. Trans-Lux Corporation*, supra note 4.

31. See, *e.g.*, *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. 1981). cf *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981). Both decisions are prior to *Shutts*.

32. *In the Matter of Colt Industries Securities Litigation*, 1991 N.Y. LEXIS 1 (Jan. 8, 1991).

33. Under *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940), due process bars binding an absent class member unless the class representative provided adequate and full representation. When the objector appears in the forum to oppose the settlement, it will likely be bound by the forum court's determination of adequacy, but it remains uncertain whether it will be precluded from challenging adequacy in the federal action when it does not appear in the state action.

34. See, *e.g., National Super Spuds Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9 (2d Cir. 1981); *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982).

35 *In re Warner Communications Sec. Litig.* 618 F. Supp. 735, 740 (S.D.N.Y 1985).

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE MCA, INC. SHAREHOLDERS LITIGATION	:	CONSOLIDATED C.A. NO. 11740

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PROPOSED SETTLEMENT

ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A.
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* * *

[D.2.]

(a) It is unlikely that the Ninth Circuit will find that SEC Rules 10b-13 and 14d-10 provide a private right of action

The Federal District Court specifically held in the California Federal Actions that there is no private right of action under Rule 10b-13. *See* Amended Order Granting Motions to Dismiss, dated February 20, 1992, Appendix, Exh. E. Recent United States Supreme Court and Ninth Circuit authority have "drastically narrow[ed]" the bases upon which private rights of action will be implied and such rights are highly "disfavor[ed]."[10] Therefore, it is doubtful that the Federal Plaintiffs will succeed in reinstating their claims on appeal as the Federal District Court has already held that there is no private right of action under SEC Rule 10b-13 and the weight of authority appears to suggest that neither SEC Rule 10b-13 nor Rule 14d-10 authorizes a private right of action.

First, the plain language of Rule 10b-13 does not state or imply that such a right of action was intended and there is no compelling evidence that the SEC intended or even considered the possibility that such a private right of action be available under that Rule. In fact, under § 21(d)(1) of the Securities Exchange Act of 1934, the Rule is enforced by the SEC through injunctive actions, thereby further reinforcing that the SEC did not contemplate that a private remedy also be available.[11] Moreover, pursuant to Rule 10b-13(d), the

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[10] *Fidelity Fin. Corp. v. Federal Home Loan Bank*, 589 F. Supp. 885, 891-92 (N.D. Cal 1983), *aff'd*, 792 F.2d 1432 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *accord California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide").

[11] *See Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 533 (1989); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981).

SEC is expressly permitted to exempt certain transactions from Rule 10b-13, which power is seemingly inconsistent with any implied private right of action. Therefore, it is unlikely that the Federal Plaintiffs will be able to carry their heavy burden of proving that, contrary to the Federal District Court's ruling, a private right of action exists under Rule 10b-13.[12]

Second, with respect to Rule 14d-10, in order for the Ninth Circuit to find that there is an implied private right of action thereunder, it must find that the Rule was promulgated pursuant to a section of the Securities Exchange Act of 1934 as to which Congress intended a private remedy to exist. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976). In this regard, Rule 14d-10 was promulgated pursuant to §§ 14(d)(6) and 14(d)(7) of the Exchange Act of 1934 which, under current analysis, would also not appear to implicate a private right of action. It does not seem that the Federal Plaintiffs will be able to satisfy their heavy burden of demonstrating that Congress intended such a private remedy because, *inter alia*, the plain language of those sections does not confer rights upon private parties. To the contrary, §§ 14(d)(6) and 14(d)(7) simply note the requirements with which an entity making a tender offer must comply in order to lawfully make such an offer. Furthermore, the legislative history of those sections is

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[12] *See, e.g., Suter v. Artist M.*, 112 S. Ct. 1360, 1370 (1992)("the burden is on respondents [*i.e.*, the Federal Plaintiffs] to demonstrate that Congress intended to make a private remedy available. . ."); *In re Washington Public Power Supply System Securities Litig.*, 823 F.2d 1349, 1353 (9th Cir. 1987)("Plaintiffs must establish that Congress intended to provide for the private remedy which they ask us to imply. . ."). *See also Jablon v. Dean Witter & Co.*, 614 F.2d 677, 680 (9th Cir. 1980)(court declined to find private right of action under § 6(b) of the Securities Exchange Act of 1934)(quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979)). Given the stringent analysis that federal courts presently employ in implying private rights of action, the Second Circuit has recently expressed doubt that a private right of action exists under Rule 10b-13. *See Field v. Trump*, 850 F.2d 938, 946 n.3 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

silent as to the creation of a private remedy thereunder. In addition, the statutory scheme into which Congress put §§ 14(d)(6) and (d)(7) expressly provides for injunctive enforcement by the SEC pursuant to § 21(d)(1) of the Securities Exchange Act of 1934 which, as with Rule 10b-13, is inconsistent with any implied private right of action under those sections. These facts would appear to suggest that the Ninth Circuit may well conclude that no private right of action exists under Rule 14d-10. *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 n.31 (1981).

* * *

[D.2.]

c. It is doubtful that the Ninth Circuit will overturn the Federal District Court's factual finding that Mr. Wasserman did not receive higher consideration than the other MCA shareholders in the Tender Offer

In its Second Amended Order, the Federal District Court concluded as follows:

> The value of the preferred stock received by Mr. Wasserman in exchange for his MCA common stock was *no greater than the $66 in cash paid pursuant to the Tender Offer*. At best the basis of the Wasserman MCA stock would be transferred to the stock of Matsushita received by Wasserman under § 368 (A)(1)(b) of the Internal Revenue Code.

Second Amended Order at 8 (emphasis added). The Federal District Court further noted that, contrary to the contentions of the Federal Plaintiffs, Wasserman did not in fact receive a tax-free transaction, but rather a transfer of tax basis to his newly- acquired preferred stock upon which he (or his heirs) will have to pay taxes when it is eventually redeemed. *Id.* at 19.

Thus, while the Federal District Court's conclusion that the Wasserman transaction did not occur during the Tender Offer period renders this point irrelevant, the Ninth Circuit is not likely to overturn the Federal District Court's finding, based on all of the evidence before it, *see, e.g.*, Declaration of Bradford Cornell dated Dec. 26, 1990, and filed in *Epstein v. MCA, et al.*, CV90-6451-R (C.D. Cal.), at ¶¶ 8, 10 (Appendix, Exh. F), that the applicable Rules were not violated as Wasserman did not receive higher consideration for his shares than the other MCA shareholders. Instead, he received illiquid preferred stock tailored to his "unique tax situation" whose lack of negotiability and relative risk, among other factors, more than sufficiently outweigh whatever tax benefits Wasserman may have derived. *See* Second Amended Order at 8, 11, 14-15; Appendix, Exh. F.

* * *

CONCLUSION

It is submitted that, for the reasons set forth above, this Court should approve the proposed Settlement.

Dated: January 19, 1993

Respectfully submitted,

ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A.

By: /s/

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

- x

LAWRENCE EPSTEIN, on behalf of himself and all others similarly situated,

JDG (GHKx)

Plaintiff,

-v-

MCA, INC., MATSUSHITA ACQUISITION CORP., MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., MATSUSHITA HOLDING CORPORATION, and LEW R. WASSERMAN,

Defendants.

No: CV 90-6451

Class Action

- x

AFFIDAVIT OF ROGER W. KIRBY

ROGER W. KIRBY, being duly sworn, says:

1. I am a member of Messrs. Kaufman Malchman Kaufmann & Kirby, counsel for plaintiff Espstein herein, and submit this affidavit in support of our motion for summary judgment and concerning a possible Delaware release.

2. During the period December 3 to the morning of December 7, 1990, Jeff Squire of my firm and I variously spoke to lawyers working for two of the four lead counsel firms in the Delaware action. We were told in words or in substance by these lawyers that they were pessimistic about their prospects for prevailing in Delaware and that defendants had shown no inclination even to discuss settlement.

3. It was during this period that our firm first learned of the organization of the Delaware case. Prior to then we had never received notice of an organization of the Delaware action appointing Delaware lead counsel and not until Friday, December 7, 1990, did we obtain, after our request therefor, a copy of the order organizing that litigation. The order, Exhibit A hereto, expressly restricts lead counsels' authority to the Delaware litigation ("Plaintiffs' Co-Lead Counsel shall set policy for plaintiffs for prosecution of *this* [Delaware] litigation...." -- Exhibit A, ¶ 5) (emphasis supplied).

4. Around 6:00 p.m. on Friday, December 7, 1990, David Bershad of Milberg Weiss Bershad et al. called me to say that defendants had now agreed to settle the Delaware action but that our agreement to fold our federal action into the Delaware was a condition precedent. Later that night, I received by fax the letter that I have attached hereto as Exhibit B.

5. Over the weekend and on Monday, our firm researched the issues raised by that letter and further researched the issues raised in our pleadings in California. We concluded that Delaware counsel was clearly incorrect both in belittling the federal claims and in believing that they would be able to fashion a release in Delaware that could legally dispose of the federal claims. Accordingly, on Monday, December 10, 1990, I reported our conclusions to Bershad.

6. Also on December 10, 1990, I had a conversation with one of Matsushita's New York lawyers, Barry Ostrager, who said that perhaps I had not seen a so-called amendment to the Delaware action pleadings that purported to embrace our federal claims. He then sent along a letter dated December 4, 1990 that Bershad had sent to defendants' counsel. This letter is the same as appears at Exhibit 2 to the Rotstein Declaration that defendants submitted as part of their December 11, 1990 papers and Exhibit C hereto.

7. We have in the last several days obtained copies of the docket in the Delaware action. A copy of the most recent version of that document in our possession is attached to this affidavit as Exhibit D. That docket reveals that neither the

December 4, 1990 letter nor any other so-called amended complaint by plaintiffs has been made part of the record of that case. The docket further reveals that none of the Japanese entities is a party to the Delaware proceeding. Federal Document Retrieval advised me at 11:30 a.m. this morning that no additions to the attached document have been made.

8. We believe that the terms of the Delaware settlement are that some of the defensive mechanisms surrounding the WWOR equity stub to be issued to all MCA shareholders, including Wasserman, who tender their MCA shares will be dismantled, which, it is claimed, will enhance one value of the stub. To the extent that this settlement confers real value upon the class, it confers the most upon Wasserman individually.

9. We have asked defendants to provide us with the memorandum embodying the settlement (Exhibit E hereto) and have asked whether or not they have sought an exemption from the Securities and Exchange Commission for any aspect of the Matsushita tender offer (Exhibit F hereto). At around 6:00 p.m., on December 13, 1990 the aforesaid Ostrager telephoned me to say that settlement papers were being drafted, that I could not have a copy of the drafts, but would receive a copy of the final version. Defendants have not responded to our request for documents concerning an SEC exemption. Finally, an MCA press release issued December 12, 1990, states in part that: "The proposed [Delaware] settlement is conditioned upon dismissal of the remaining lawsuit [*i.e.*, the instant one] in federal district court in Los Angeles." That press release is Exhibit G hereto.

/s/

ROGER W. KIRBY

Sworn to before me this
14th day of December 1990

/s/

NOTARY PUBLIC

(9)

Supreme Court, U.S.
FILED
AUG 3 1995
CLERK

No. 94-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORP.,

Petitioners,

vs.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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BEST AVAILABLE COPY

69 pp

QUESTION PRESENTED

The 1990 acquisition of MCA by Matsushita gave rise to shareholder class action litigation in Delaware state court and later in a California federal district court. The named plaintiffs in each court claimed to represent the shareholders of MCA. The federal district court denied class action status and entered summary judgment for Matsushita dismissing the action.

After the dismissal of the federal action, the parties to the Delaware class action negotiated a settlement that released all claims arising out of the acquisition of MCA. The Delaware Chancery Court certified a class for settlement purposes and approved a notice informing class members of their right to opt out of or to object to the settlement. A hearing was held by the Delaware court at which objectors challenged the adequacy of the class representation and the fairness of the settlement. The Delaware court thereafter approved the settlement as fair and entered a judgment incorporating the terms of the settlement. The judgment was affirmed by the Delaware Supreme Court.

Respondents neither opted out of nor objected to the Delaware class settlement, but continued to litigate the very federal claims they had released by appealing the dismissal of the federal action to the Ninth Circuit Court of Appeals. Matsushita invoked the Delaware judgment and release as a bar to the further prosecution of the federal claims. The Ninth Circuit refused to give full faith and credit to the Delaware judgment, holding that state courts lack the power to approve a class action settlement releasing exclusively federal claims. The Ninth Circuit reversed the district court's dismissal of the federal action and entered summary judgment for plaintiffs on certain federal claims. Additionally, the Ninth Circuit directed the district court to certify a class consisting of thousands of former MCA shareholders who had elected *not* to opt out of the state court proceedings and who had accepted the proceeds of the state settlement without objection. This case presents the following question:

> Whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement included a release of exclusively federal claims.

PARTIES TO THE PROCEEDING

The named plaintiffs in the federal class action *Epstein, et al. v. MCA INC., et al.*, Docket No. 92-55675 (C.D. Cal.), are Lawrence Epstein, John Linder, Jane Rockford (as trustee of the Michael J. Rockford Trust), Maurice Karlin, Ruth Karlin, Beth Ann Karlin, and Bert P. Karlin. The plaintiff in *Minton v. MCA INC., et al.*, Docket No. 92-55632 (C.D. Cal.), is Walter Minton. These two cases were consolidated by the district court and the court of appeals and were treated as one case for purposes of the petition for a writ of certiorari. Walter Minton and Jane Rockford opted out of the Delaware settlement and are not bound by the Delaware judgment and release. Therefore, neither Walter Minton nor Jane Rockford is a respondent for purposes of this proceeding.

The defendants in the consolidated federal action were MCA, Matsushita Acquisition Corp., Matsushita Electric Industrial Co., Ltd., Matsushita Holding Corp., Lew R. Wasserman, and Sidney J. Sheinberg. The Ninth Circuit affirmed the dismissal of all claims against MCA and Messrs. Wasserman and Sheinberg, and those defendants are no longer parties. Matsushita Acquisition Corp. no longer exists by virtue of being merged into MCA.

RULE 29.1 LISTING

Pursuant to Supreme Court Rule 29.1, petitioners Matsushita Electrical Industrial Co., Ltd. and Matsushita Holding Corp. hereby state that their only parent or subsidiary that is not wholly owned is Cineplex Odeon Corp. On June 5, 1995, Matsushita sold eighty percent of its interest in MCA to The Seagram Company, Ltd.

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No. 94-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORP.,

Petitioners,

vs.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 50 F.3d 644.[1] The findings of fact and conclusions of law of the district court (Pet. App. 45a-61a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 27, 1995 (Pet. App. 1a) and denied a timely petition for rehearing and rejected a suggestion for rehearing in banc on April 6, 1995 (Pet. App. 62a). The petition for a writ of certiorari was filed on May 3, 1995, and was granted on June 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] References to documents contained in the Appendix to Petition for a Writ of Certiorari are designated as "Pet. App. ___." References to documents contained in the Joint Appendix are designated as "J.A. ___." References to documents contained in the record of the district court and court of appeals are designated as "R. ___."

STATUTORY PROVISION INVOLVED

Section 1738 of Title 28 provides with respect to the authenticated acts, records and judicial proceedings of any State:

> Such Acts, records and judicial proceedings, or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

The Delaware Chancery Court approved an "opt out" settlement of a class action arising out of Matsushita's 1990 acquisition of MCA. The Chancery Court entered a judgment on the settlement that incorporated a release of all claims relating to the acquisition, including the exclusively federal securities law claims asserted here by respondents. The Delaware Supreme Court affirmed the judgment. The Ninth Circuit refused to give full faith and credit to the judgment on the ground that "a court's jurisdiction to extinguish claims by class *settlement* should not exceed its jurisdiction to extinguish claims by *adjudication*." *Epstein v. MCA INC.*, 50 F.3d 644, 664 (9th Cir. 1995) (reprinted at Pet. App. 1a) (emphasis added).

The Ninth Circuit decision nullified the state court judgment and freed the class members from their obligations under the court-approved contract of settlement. The Ninth Circuit thus countenanced a collateral attack on the state judgment by respondents who neither objected to nor opted out of the state court settlement. The Ninth Circuit decision undermines fundamental interests of federalism and the fostering of settlements, encourages the type of inefficient litigation strategies adopted by respondents, and forces complex class action litigations into the federal courts.

A. Matsushita's Acquisition of MCA

Matsushita purchased MCA for $6.6 billion on December 29, 1990. The acquisition involved a tender offer to the public shareholders and a privately negotiated purchase of shares

owned by MCA founder Lew Wasserman. The tender offer price of $66 cash per share gave tendering shareholders close to a 100% premium over the market price. J.A. 166. More than ninety percent of all MCA shares were tendered in response to Matsushita's offer. Pet. App. 49a.

The Wasserman transaction consisted of a tax-free exchange of Mr. Wasserman's MCA shares for an illiquid preferred stock in a Matsushita subsidiary. The preferred stock was structured to be no more valuable than the tender offer consideration. Pet. App. 13a, 50a. By design, the Wasserman transaction was entered into before the tender offer commenced and was consummated shortly after the tender offer expired. Pet. App. 48a-50a.

B. The State Court Class Actions

On September 26, 1990, the day after the *Wall Street Journal* reported that Matsushita might seek to acquire MCA, counsel for respondents and many other law firms filed complaints in the Delaware Chancery Court on behalf of a class of all MCA shareholders. These complaints and others filed thereafter were consolidated by order of the Delaware court.[2] The consolidated complaint sought injunctive relief against Matsushita's proposed acquisition of MCA. R.57, Exh. A, at 20-22.

On November 30, Matsushita issued a Schedule 14D-1 disclosing the terms of its tender offer to acquire MCA. On December 4, 1990, the Delaware plaintiffs amended the allegations of their complaint pursuant to a stipulated procedure. *See* J.A. 211. The Delaware plaintiffs added Matsushita as a defendant and alleged that (1) Matsushita and MCA were jointly responsible for misleading disclosures in the tender offer documents; (2) the MCA Board of Directors failed to maximize shareholder value because Matsushita had corrupted Mr. Wasserman and Sidney Sheinberg (MCA's chief operating officer) by offering them preferential treatment in

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[2] By order of the Chancery Court dated October 2, 1990, four law firms were designated as plaintiffs' Co-Lead Counsel, and sixteen additional firms were designated as the plaintiffs' Committee of the Whole. Counsel for respondents was named to the Committee of the Whole. J.A. 131-32.

the form of, respectively, the preferred stock and a multimillion dollar bonus, and (3) Mr. Wasserman "impermissibly negotiated preferential arrangements in connection with the transaction by which he will exchange [MCA] stock for [the preferred] stock and avoid costly capital gains taxes to which all other stockholders are subject." J.A. 217. On December 14, the Delaware plaintiffs filed a formal amended complaint elaborating on these allegations: "Matsushita willingly agreed to pay, and encouraged the payment of [the preferred stock to Mr. Wasserman and the bonus to Mr. Sheinberg] because of its expectation that this would vastly limit the independence of senior management and the MCA Board in negotiating with Matsushita and thereby save the purchaser potentially hundreds of millions or billions of dollars in acquisition costs." J.A. 147.

C. Respondents File a Federal Action That Also Purports to Represent the MCA Shareholders

On December 3, 1990, after the designation of Lead Counsel in the consolidated Delaware class action, *see* note 2, *supra*, and during the pendency of settlement negotiations in the Delaware action, *see* Pet. App. 83a, counsel for respondents filed this *Epstein* class action in a federal district court in California seeking to enjoin the Matsushita acquisition. The complaint was filed on behalf of all MCA shareholders owning stock subject to Matsushita's tender offer -- a class subsumed in the class for whose benefit the Delaware action was being prosecuted. The federal complaint, together with several subsequent related actions, alleged that the preferred stock Mr. Wasserman would receive was more valuable than the $66 per share tender offer price and that the Wasserman transaction therefore violated Securities and Exchange Commission Rule 14d-10, which requires an equal price to be paid for all stock purchases made "during [a] tender offer." *See* 17 C.F.R. § 240.14d-10. The *Epstein* complaint was later amended to assert that Matsushita also violated Rule 14d-10 by paying Mr. Sheinberg preferential consideration for his MCA shares by "ostensibly" compensating him for entering into a long-term employment contract. J.A. 91-92.

D. The First Delaware Settlement

On December 11, 1990, the parties to the consolidated Delaware action agreed to a settlement. The non-opt out settlement provided for the release of all shareholder claims arising out of the acquisition, in exchange for the payment of attorneys' fees and the modification of a "poison pill" in the charter of an MCA subsidiary that was spun off to the shareholders. J.A. 161, 165, 170-71. Notice was sent to all MCA shareholders describing the nature of the state and federal litigations, explaining that the settlement would release all claims arising out of the acquisition, including those in the *Epstein* action, and advising shareholders of their right to object to the settlement. R. 57, Exh. D.[3]

On April 22, 1991, the Delaware Chancery Court rejected the proposed settlement as inadequate. J.A. 159-71. The Chancery Court found that the state law claims asserted in the amended complaint were weak, and that the value of the settlement consideration was minimal. J.A. 165-67, 170-71. Addressing the federal securities law claims, the court noted that they had "not yet been definitively addressed" by the federal courts and therefore had "at least arguable merit." J.A. 169-70. The Chancery Court concluded "that it would be unfair to compel the release of the federal claims by approving the settlement in its present form," which did not provide class members an opportunity to opt out. J.A. 171.[4]

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[3] The only objectors to the proposed settlement were David and Andrew Minton, whose father, Walter Minton, had filed an individual complaint in the California federal district court that mirrored the allegations in the *Epstein* action (with which it was later consolidated). The basis of the Mintons' objection was twofold: (1) the settlement did not provide for opt outs, and (2) the class was not being sufficiently compensated for the release of its federal claims. Pet. App. 87a; J.A. 163, 167-68, 171.

[4] The Chancery Court also (1) noted that in reviewing a settlement a court does "not decide the merits of the issues," and (2) stated that the settlement could release federal claims:

> When a state court settlement of a class action releases all claims which arise out of the challenged transaction and is determined to be fair and to have met all due process requirements, the class

(Footnote continued)

E. The District Court Dismisses the Federal Action on the Merits

Thereafter, on February 10, 1992, the federal district court granted Matsushita's motion for summary judgment, holding that the Wasserman transaction did not violate Rule 14d-10 because stipulated facts established that the Wasserman transaction was agreed to and consummated when no tender offer was pending. Pet. App. 49a-50a, 52a-55a. The district court found tnat the preferred stock received by Mr. Wasserman was not more valuable than the $66 per share being offered to the public shareholders. Pet. App. 50a, 58a-59a. The district court also dismissed the claim challenging the payment to Mr. Sheinberg on substantive grounds. Pet. App. 51a, 59a. Respondents' appeal to the Ninth Circuit followed.

F. The Second Delaware Settlement

Subsequent to the dismissal of the federal action, and during the pendency of respondents' appeal to the Ninth Circuit, the parties to the Delaware action negotiated an opt-out settlement. The settlement provided for a payment by Matsushita of $2 million to the class in exchange for a release of all claims arising out of the MCA acquisition, including the federal securities law claims that had been dismissed in California. J.A. 187-88. By order dated October 27, 1992, the Chancery Court certified the Delaware action as a class action for purposes of settlement, and authorized the named plaintiffs and lead counsel to represent the interests of the class at the hearing which the court scheduled to consider the fairness of the settlement. J.A. 198-203.

1. The Notice to the Class

The court-approved notice of the proposed settlement mailed to each class member described the state court proceedings, the federal court proceedings, the appeal in the

> members are bound by the release or the doctrine of issue preclusion. Class members cannot subsequently relitigate the claims barred by the settlement in a federal court.

J.A. 163 (citations omitted).

Ninth Circuit, and the terms of the proposed settlement. Pet. App. 78a-94a. The Notice also:

- Advised that, if approved, the settlement would release all claims relating to Matsushita's acquisition of MCA, specifically including the securities law claims in the federal actions. *Id.* at 93a-94a.
- Informed each class member of the right to object to the settlement, *id.* at 97a-99a, and stated that any class member who failed to object would *"be deemed to have waived such objections and shall be forever barred from raising such objection in this or any other action or proceeding," id.* at 99a (emphasis added).
- Explained that class members could opt out of the settlement and that by doing so could preserve their state and federal claims. *Id.* at 96a.[5]

2. The Opt Outs and Objectors

The court-approved notice was mailed to the class members, and a summary form of notice was published in the *Wall Street Journal*. J.A. 199-200. More than 25,000 shareholders were notified. Pet. App. 69a. Only 19 members of the class exercised the right to request exclusion from the settlement. Pet. App. 69a.[6] Respondents did not opt out. Nor did

[5] In a section titled **"RIGHT TO REQUEST EXCLUSION,"** the Notice stated:

> All members of the Settlement Class have the option of excluding themselves from the Settlement Class by mailing a timely and valid Request for Exclusion . . . . By filing a valid Request for Exclusion, a member of the Settlement Class will not be precluded by the Settlement from individually seeking to pursue the claims alleged in the Delaware Actions, the California Federal Actions . . . or any other claim relating to the events at issue in the Delaware Actions.

Pet. App. 96a.

[6] Those who chose to opt-out included Walter Minton, five Minton family members and trusts, and Jane Rockford. *See* Parties to the Proceeding,

(Footnote continued)

respondents choose to object to the settlement in the Delaware Chancery Court.

The three people who did object to the settlement contended that the settlement fund was inadequate and that the settlement was the result of "collusion" between class counsel and counsel for defendants. Pet. App. 69a-70a.[7] None of the objectors asserted that the Delaware Court lacked the authority to approve a class action settlement that releases exclusively federal claims.

3. The Delaware Courts Approve the Settlement

The Chancery Court held a fairness hearing on January 21, 1993. Counsel for the objectors appeared and were heard. In its decision approving the settlement, the Chancery Court reaffirmed its prior determination that state court class action settlements can release exclusively federal claims, Pet. App. 63a, and noted that a "Court must be particularly careful in reviewing a proposed settlement that has the effect of barring claims of at least arguable merit that are not asserted in Delaware but are being asserted in another forum." Pet. App. 67a. The Chancery Court again found the state law claims of "little or no value." Pet. App. 68a. As to the federal claims, the court referenced its prior opinion, but noted that "[n]ow, however, there has been a full hearing on the federal claims and those claims have been rejected on both legal and factual grounds in the U.S. District Court." Pet. App. 68a. Acknowledging the possibility of a reversal by the Ninth Circuit, the Chancery Court observed that "the determination of the federal district court that the claims lack merit must be accorded substantial weight in determining the *present* settlement value of those claims" and concluded that the federal claims therefore had

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supra. Only 4 of the 19 opt-outs have pursued their claims individually: three Minton family members and Rockford. J.A. 182, 184.

[7] The three objectors were Walter Minton's wife (Marion Minton) and daughter (Pamela Minton) and one Mr. William Krupman, who was counseled by respondents' attorneys prior to filing his objection. J.A. 233, 248-51.

"minimal economic value." Pet. App. 68a, 69a (emphasis added).[8]

Weighing the state claims having "little or no value" and the federal claims of "minimal economic value" against the $2 million benefit to the class, the Chancery Court approved the settlement as "fair, reasonable and adequate and in the best interests of the plaintiffs and the Settlement Class." Pet. App. 74a. The court also found that the settlement was fair because "[t]he availability of the right to opt-out of the class protects the ability of class members who find the proposed settlement inadequate to continue the district court litigation." Pet. App. 69a.

The Chancery Court found that the representation of the class was adequate, that the notice to the class the "best practicable" notice, and that all the requisites of due process had been satisfied. Pet. App. 73a-74a.[9] The Chancery Court also found that the objectors "ha[d] offered no evidence of any collusion." Pet. App. 70a. The court's final judgment, entered on February 22, 1993, implemented the settlement agreement by providing for the release of all state and federal claims held by all members of the settlement class who did not opt out arising from, *inter alia*, Matsushita's tender offer, the Wasserman transaction, any of the "matters, transactions or occurrences" referred

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[8] Regarding the objectors' argument that it should await the decision of the Ninth Circuit -- which would not be rendered for another two years -- the Chancery Court observed: "If this Court rejects the settlement, the $2 million dollar benefit will vanish. . . . Unless fair settlements are promptly approved, the settlement process will be adversely impacted. Therefore, the Objectors' request that this Court indefinitely delay its review of the settlement must be denied." Pet. App. 69a.

[9] The Chancery Court found that the Delaware plaintiffs "as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class and that the maintenance of this action as a class action meets all the requirements of Rule 23(a) and (b)(3) of the Court of Chancery." Pet. App. 73a-74a.

Significantly, Delaware Court of Chancery Rule 23 and Fed. R. Civ. P. 23 are virtually identical. *Cf. Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1555 n.2 (3d Cir.), *cert. denied*, 115 S.Ct. 480 (1994).

to in the Delaware pleadings, and all the claims asserted in respondents' federal actions. Pet. App. 74a-75a.[10]

On September 21, 1993, the Delaware Supreme Court affirmed the Chancery Court on the basis of the lower court's opinion. Pet. App. 76a.

G. The Ninth Circuit Decision

Upon the issuance of the Delaware Supreme Court affirmance, Matsushita invoked the Delaware final judgment as a bar to the continued prosecution of the appeal in the Ninth Circuit on behalf of any shareholder who had not opted out of the Delaware settlement. Matsushita relied on the Full Faith and Credit Act and this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), concerning the binding effect of an opt out class action settlement. Respondents -- who had neither opted out of nor objected to the settlement -- appeared before the Ninth Circuit and attacked the Vice

[10] The release language incorporated in the final judgment provided:

> All claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class (other than those who have validly requested exclusion therefrom) . . . in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement [the agreement governing the Wasserman transaction], the employee compensation arrangements [the agreements governing the payment to Mr. Sheinberg] . . . this Settlement . . . or any matters, transactions or occurrences referred to in the December 4, 1990 Claim Letter and the Amended Complaint in the [Delaware] Action . . . including without limitation the claims asserted in the California Federal Actions [a defined term encompassing the *Epstein*, *Linder*, *Karlin*, and *Minton* actions, *see* Pet. App. 88a]. . . are hereby compromised, settled, released and discharged with prejudice by virtue of the proceedings herein and this Order and Final Judgment.
>
> Pet. App. 74a-75a.

Chancellor of the Delaware Chancery Court as obtuse and "passive," R. 57 at 19, 28; characterizing Delaware representatives and their counsel as corrupt, *id.* at 4, 17-18, 24, 27-28; and impugning the integrity of the Delaware state court system, *id.* at 31 ("The Delaware proceedings are little more than a sham."). Respondents also argued, for the first time, that a state court lacks the power to approve the release of "exclusively federal" claims. *Id.* at 31-34.

The Ninth Circuit denied full faith and credit to the Delaware final judgment, asserting a "policy" requiring that exclusively federal claims of a *class* be resolved by settlement only in federal court. Pet. App. 40a n.33. The court held that "a state court cannot require passive class members to contractually release their exclusively federal claims in order to enjoy the benefits of a state class action, when the court has no jurisdictional power to dispose of those claims either directly or indirectly through the doctrine of issue preclusion." Pet. App. 40a. The Ninth Circuit acknowledged that "individual plaintiffs may release whatever claims they choose in settling traditional non-class litigation," and that the same was true of derivative actions, but held that "the settlement of a class action is fundamentally different." Pet. App. 37a-38a & n.32.

With respect to the merits of respondents' federal securities claims, the Ninth Circuit held that there is an implied private right of action under Rule 14d-10, and that Rule 14d-10 covers transactions occurring not only "during [a] tender offer"-- as the Rule provides -- but also any transaction that is "an integral part" of a tender offer regardless of when it occurs. Pet. App. 17a.[11] Applying its expansive interpretation of Rule

[11] The Ninth Circuit held that every regulation promulgated under a statute that has been held to be privately enforceable automatically confers its own private right of action -- regardless of the language or purpose of the regulation. Pet. App. 5a n.8. This holding is at odds with "settled interpretive principles regarding implied causes of action," *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439, 1455 (1994), and conflicts with the law of three circuits. *See Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992); *Ashbrook v. Block*, 917 F.2d 918 (6th Cir.

(Footnote continued)

14d-10 to the Wasserman transaction, the Ninth Circuit concluded that, notwithstanding that the Wasserman transaction took place when no tender offer was pending, it should be deemed an integral part of the tender offer. Pet. App. 18a.[12] The court entered summary judgment for respondents and remanded for a trial to determine damages, if any. The Ninth Circuit found that the "claims of every tendering shareholder turn on identical facts and law," Pet. App. 41a, and directed the district court to certify a class consisting of *all* MCA shareholders.[13]

On May 3, 1995, Matsushita filed a petition in this Court for a writ of certiorari seeking review of the Ninth Circuit's holdings that (1) the Delaware judgment was not entitled to full faith and credit, (2) the Wasserman transaction violated Rule 14d-10, and (3) there is an implied private right of action under Rule 14d-10. This Court granted the petition with respect to the first issue.

1990); *Angelastro v. Prudential Bache Sec., Inc.*, 764 F.2d 939 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985).

With respect to the merits of the Rule 14d-10 claim, the Ninth Circuit held that because the Wasserman transaction was "conditioned" on the successful completion of the public tender offer, it would be "deemed" to have taken place *during* the tender offer even though it did not in fact take place at that time. Pet. App. 17a-18a. This ruling directly conflicts with the holding in *Kahn v. Virginia Retirement System*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994), in which the Fourth Circuit recognized that Rule 14d-10 operates only during the defined period of time when a tender offer is actually taking place.

[12] Regarding the bonus payment by MCA to Mr. Sheinberg, the Ninth Circuit held that there was a genuine issue of fact whether the payment constituted "an inducement to support the tender offer and tender his own shares." Pet. App. 23a. The court vacated summary judgment for Matsushita on this claim and remanded for a determination of liability. Pet. App. 23a.

[13] Previously, the district court twice denied respondents' motions for class certification on the ground that respondents could not satisfy the elements of Federal Rule of Civil Procedure 23. *See* R. 98, 171.

SUMMARY OF THE ARGUMENT

The Delaware court approved the consensual settlement of a class action properly before it. In so doing, it exercised the established power of a court to approve a settlement of all claims arising from the controversy before it, including exclusively federal claims. Contrary to the Ninth Circuit's analysis, a class action settlement, like any other settlement, is a private contractual agreement between the parties upon which a judgment can be entered. When a state court enters a judgment upon a settlement, no legitimate federal interest is implicated that can justify intrusion by a federal court on state judicial processes. This is particularly so where, as here, the state settlement is subjected to a state court approval process that provides an opportunity for all class members who wish to pursue their claims -- state or federal -- to opt out of the settlement and do so.

I. The Ninth Circuit's decision vacated the considered judgments of a state supreme court and state trial court. The Ninth Circuit justified its interference with the finality of the state court judgment on the basis of an expressed concern for absent class members. But this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), has defined the procedural protections necessary for absent class members. When absent class members are afforded full notice of a settlement, an opportunity to be heard with respect thereto, the right to opt out, and the guardianship of the settling and appellate courts -- and ultimately this Court on direct appeal under 28 U.S.C. § 1257(a) -- no more is required, or reasonably should be. Indeed, since avoidance of duplicative litigation is an impetus for the class action mechanism, courts should *encourage* class action settlements releasing the broadest possible range of claims. The Ninth Circuit evidently distrusted the state court's evaluation of the fairness of the settlement, but such distrust has no place in our system of federalism.

II. The Delaware judgment is final and may not be undermined through collateral attack in a federal court. The Full Faith and Credit Act, 28 U.S.C. § 1738, so requires. Exceptions to the Full Faith and Credit Act are rare. This case involves

neither an express nor implied repeal of § 1738. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 381 (1985). There is no basis for implying a congressional intent that claims under the Securities Exchange Act of 1934 may not be settled and released by agreement of private parties in state court litigation.

III. The Ninth Circuit established a novel test for determining the preclusive effect of a state court judgment entered on a class action settlement releasing federal claims. Under the Ninth Circuit's analysis, a state court can approve a class settlement only of claims that it can adjudicate. This test conflates the entirely separate concepts of release and issue preclusion and strips state courts of the power to resolve disputes properly before them.

IV. State court judgments are given preclusive effect in federal court through the Full Faith and Credit Act in order to advance the interests of federalism, comity, finality of judgments, and judicial efficiency. The costs of the Ninth Circuit's disturbance of the relationship between state and federal courts are enormously high:

- The right of parties to resolve a legal dispute by contract is undermined. When a judgment is entered on a settlement, full faith and credit has the added effect of holding parties to their bargain. The Ninth Circuit decision allows parties to renege on a court-approved contract.
- The legal system depends upon the finality of judgments. The Ninth Circuit decision eliminates finality with respect to prior state court class action settlements releasing federal claims as to which the statute of limitations has not run.
- The Ninth Circuit decision allows class members to bypass state court settlement fairness hearings, raising no objections, and then collaterally attack the state court judgment in federal court. No litigant should be permitted to intentionally sit on its arguments while a class action settlement hearing goes forward in one (state) court and then, if the judgment of that court is not to its liking, collaterally raise its objections in a second (federal) court.

- The court of appeals' decision requires parties to class action litigation to seek a federal forum because it will now be improvident for a defendant to settle a state class action involving facts that could be the basis for an exclusively federal claim. Thus, state class actions are radically discouraged, while all class action litigation that arguably contains the seed of an exclusively federal claim will be channeled into federal court.

ARGUMENT

I. A GRANT OF "EXCLUSIVELY FEDERAL" JURISDICTION TO ADJUDICATE CLAIMS DOES NOT PRECLUDE A STATE COURT FROM APPROVING A CLASS ACTION SETTLEMENT THAT INCLUDES A RELEASE OF "EXCLUSIVELY FEDERAL" CLAIMS

A court approving a settlement voluntarily reached by the parties before it does not adjudicate the rights and liabilities of the parties. Rather, the settlement agreement defines the obligations voluntarily assumed by parties. When a state court approves a settlement releasing exclusively federal claims, the court does not adjudicate those claims. *See Nottingham Partners v. Dana*, 564 A.2d 1089, 1104 (Del. 1989) ("*Dana*") ("[T]he law has uniformly distinguished between the approval of a general release and dismissal or adjudication of an exclusively federal claim. The former is within a state court's power, the latter is not."); *see also Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.) ("In determining the adequacy and reasonableness of the proposed settlement, the court does not adjudicate the dispute."), *cert. denied*, 459 U.S. 828 (1982); *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 762 (2d Cir. 1968) ("Although the state court could not adjudicate the federal claim, it was within its powers over the corporation and the parties to approve the release of that claim as a condition of settlement of the state action.").

Thus, a court need not have subject matter jurisdiction over a claim in order to approve a settlement incorporating its release. *See Grimes v. Vitalink Communications Corp.*, 17 F.3d

1553, 1564 (3d Cir.) (state courts have the power "to approve and enforce settlements which reflect the parties' intent to release all claims arising from a transaction regardless of whether the class action court has jurisdictional competency to hear those claims"), *cert. denied*, 115 S. Ct. 480 (1994); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1288 (9th Cir.) ("[I]t was not necessary . . . to actually exercise subject matter jurisdiction over the claims to approve their release."), *cert. denied*, 113 S. Ct. 408 (1992); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991) ("[A]s a matter of federal law, a state court can approve and enforce a settlement which requires a party to release claims actually brought, or potentially 'bringable,' in federal court under 'exclusive jurisdiction' federal statutes even though the state court could not adjudicate claims arising under such statutes."); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 221 (5th Cir. 1981) ("[E]ven when the court does not have power to adjudicate a claim, it may still 'approve release of that claim as a condition of settlement of [an] action [before it].' ") (citations omitted) (alteration in original); *Sandler Assoc. L.P. v. BellSouth Corp.*, 818 F. Supp. 695, 704 (D. Del. 1993) (The Delaware Chancery Court has the "power to approve a release encompassing federal securities law claims . . . not within the subject matter jurisdiction of the Delaware State courts."), *aff'd*, 26 F.3d 123 (3d Cir.), *cert. denied*, 115 S. Ct. 481 (1994).[14]

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[14] *See also TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982) ("[W]e have recognized the authority of a state court to approve a settlement that releases a claim within the exclusive jurisdiction of the federal courts."); *Gabelli v. Sikes Corp.*, No. 90 Civ. 4904, 1990 WL 213119, at *5 (S.D.N.Y. Dec. 14, 1990) (staying federal securities action pending court approval of Florida state court class settlement because "of the imminent possibility that the Florida courts will dispose of the exclusive federal issue by approving the settlements and its attendant releases"); *Lowenschuss v. Resorts Int'l, Inc.*, Civ. A. No. 89-1071, 1989 WL 73254, at *6, *9 n.15 (E.D. Pa. June 29, 1989) (determining that state court settlement and release bars exclusively federal claims), *aff'd without op.*, 947 F.2d 936 (3d Cir. 1991); *Seagoing Uniform Corp. v. Texaco, Inc.*, 705 F. Supp. 918, 923 (S.D.N.Y. 1989) (recognizing that release in "class

(Footnote continued)

The principal federal interest in a grant of exclusive federal jurisdiction is to achieve uniformity in *adjudications* of the rights and liabilities arising under a particular area of federal law. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983); 18 Charles A. Wright, Arthur R. Miller & E. H. Cooper, *Federal Practice and Procedure* § 4470, at 679 (1981). That federal interest is not implicated when a state court approves a settlement including a release of federal claims, because in performing that function the state court neither exercises jurisdiction over nor adjudicates the federal claims.

A settlement is ordinarily impractical unless it covers all claims, actual and potential, state and federal, arising out of the transaction at issue. A defendant would accomplish little by settling an action alleging state law claims if a federal claim arising from the same transaction could then be prosecuted on behalf of the same individuals with whom the defendant had settled. *See McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1467 (1994) (noting that defendants have no incentive to settle unless settlement agreement precludes possibility of further liability); *In re Nat'l Smelting, Inc.*, 722 F. Supp. 152, 178 (D.N.J. 1989) (there would be "absolutely no incentive to settle with the plaintiff [where] a settlement would be accompanied by no repose"); *Boothe v. Baker Indus., Inc.*, 262 F. Supp. 168, 174 (D. Del. 1966) (noting that it is "inconceivable" that defendant would have "surrendered" certain rights in the state settlement unless the plaintiff corporation and its stockholders "were barred once and for all from relitigating

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action derivative suit" in Delaware could foreclose Exchange Act claims); *Bernstein v. Mediobanca Banca di Credito Finanziario-Societa per Azioni*, 78 F.R.D. 1, 5 (S.D.N.Y. 1978) (finding that general release in state court derivative settlement bars federal securities derivative action). The point is indeed one of hornbook law: "Apart from claim preclusion as such, settlement of state court litigation has been held to defeat a subsequent federal action if the settlement was intended to apply to claims in exclusive federal jurisdiction as well as other claims. . . . *These rulings are surely correct.*" 18 Charles A. Wright, Arthur R. Miller & E. H. Cooper, *Federal Practice and Procedure* § 4470, at 688-89 (1981) (emphasis added).

the transactions which were the subject of" the prior proceeding); *Raskin v. Birmingham Steel Corp.*, Civ. A. No. 11365, 1990 WL 193326, at *7 (Del. Ch. Dec. 4, 1990) (stating that without "the release of federal securities law claims arising from [a] merger . . . [s]ettlement . . . would hardly be practicable").

A. The Ninth Circuit Erroneously Concluded That a Class Action Settlement Is Analytically Different From an Individual or Derivative Settlement

The Ninth Circuit's rationale for denying full faith and credit to the Delaware judgment is that an unparticularized "public policy" concern for the rights of absent class members precludes a state court from requiring "passive class members to contractually release their exclusively federal claims in order to enjoy the benefits of a state class action [settlement]." Pet. App. 40a & n.33. The court recognized that state courts have the power to approve the settlement of exclusively federal claims in an individual or derivative action, but held that the "settlement of a class action is fundamentally different from the settlement of a traditional litigation." Pet. App. 37a-38a & n.32.[15] Thus, the "policy" that motivated the Ninth Circuit is that only a federal court can approve a class action settlement that releases a federal securities law claim, even though:

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[15] Oddly, the court failed to note that derivative claims are pursued through much the same mechanism as class suits. Like class actions, derivative suits cannot be maintained or settled unless the court determines that the nominal plaintiff will "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Fed. R. Civ. P. 23.1. *See In re Salomon Inc. Shareholders Derivative Litig.*, No. 91 Civ. 5500 (RPP), 1994 WL 533595, at *7 (S.D.N.Y. Sept. 30, 1994) ("[D]erivative suits, like class actions, are complex litigations of a representative nature which the Judicial Conference has determined present the necessity of close and careful court supervision to ensure in part that the interests of absent shareholders are protected.").

- a state court can determine factual issues that preclude subsequent prosecution of exclusively federal causes of action;[16] and
- non-federal and even non-judicial fora can resolve causes of action that are within the exclusive jurisdiction of the federal courts;[17] and
- a state court-approved release terminates exclusively federal causes of action in individual and derivative actions, Pet. App. 37a-38a & n.32; and

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[16] *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 266 n.18 (1982) ("We frequently permit state courts to decide 'collaterally' issues that would be reserved for the federal courts if the cause of action arose directly under federal law."); *Becher v. Contoure Labs., Inc.*, 279 U.S. 388, 391-92 (1929) (Holmes, J.) ("That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that if it is true an important patent is void."). Indeed, federal courts have stayed class actions alleging exclusively federal securities law claims pursuant to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), pending a final determination of parallel state court proceedings, on the ground that disposition of the state action might compel dismissal of the federal action. *See, e.g., Lorentzen v. Levolor Corp.*, 754 F. Supp. 987, 992 (S.D.N.Y. 1991); *Gabelli*, 1990 WL 213119, at *5.

[17] (1) Exclusively federal claims may be decided in arbitration. *See, e.g., Shearson v. MacMahon*, 482 U.S. 220, 238 (1987) (Exchange Act claims); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633-34 (1985) (federal antitrust claims). A judgment entered on an arbitration award resolving an exclusively federal claim is entitled to preclusive effect in a subsequent federal action. *See, e.g., Hough v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 757 F.Supp. 283, 291-92 (S.D.N.Y.), *aff'd*, 946 F.2d 883 (2d Cir. 1991). (2) State courts may adjudicate federal securities law defenses raised in response to state claims. *See, e.g., Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 658-59 (1978); *Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 821-22 (9th Cir. 1975); *cf. Bement v. National Harrow Co.*, 186 U.S. 70, 87-88 (1902) (antitrust defenses). (3) Under principles of forum non conveniens, a foreign sovereign that has legal competence to adjudicate "somewhat similar" claims may adjudicate exclusively federal claims. *See, e.g., Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 766 (9th Cir. 1991) (holding that "Japan is the more convenient forum" to adjudicate copyright claims).

- a state court judgment can determine or resolve any non-exclusive federal cause of action (*e.g.*, a securities claim under the Securities Act of 1933).[18]

The Ninth Circuit determined that class actions are "fundamentally different" because class members "do not individually consent" to a settlement. Pet. App. 38a-39a. However, in a decision issued subsequent to *Epstein*, the Ninth Circuit rejected this reasoning, holding:

> A class action settlement, like the settlement of any other legal claim, is a "private consensual agreement negotiated between the parties". . . . The fact that it is approved by the court does not change the fact that the settlement is essentially a private, contractual agreement between the parties.

Cohen v. Resolution Trust Corp., Nos. 94-55209, 94-55218, 1995 WL 444436, at *3 (9th Cir. July 28, 1995) (citations omitted).

[18] The Ninth Circuit's decision is anomalous because it would permit state courts to approve settlements releasing 1933 Act claims, over which the state courts have concurrent jurisdiction, *see Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 482 (1989), but not claims under the Securities Exchange Act of 1934. This ruling collides with

> the principle that the 1933 and 1934 Acts should be construed harmoniously because they "constitute interrelated components of the federal regulatory scheme governing transactions in securities." In this case, for example, petitioners' claims under the 1934 Act were subjected to arbitration, while their claim under the 1933 Act was not permitted to go to arbitration . . . . *That result makes little sense for similar claims, based on similar facts, which are supposed to arise within a single federal regulatory scheme. In addition, th[is] inconsistency . . . undermines the essential rationale for a harmonious construction of the two statutes, which is to discourage litigants from manipulating their allegations merely to cast their claims under one of the securities laws rather than another.*

Id. at 484-85 (emphasis added) (citations omitted). If, as is often the case, the same conduct or transaction gives rise to claims under both the 1933 Act and the 1934 Act, the Ninth Circuit's decision would permit a state court to approve a settlement releasing claims (asserted or unasserted) under the 1933 Act, but *not* the 1934 Act.

Here, the "private, contractual agreement" releasing the claims was negotiated on behalf of the class by class counsel acting pursuant to Delaware class action law. Thus, pursuant to Delaware Chancery Rule 23 -- which is virtually identical to Fed R. Civ. P. 23, *see* note 9, *supra* -- class members, all of whom had an opportunity to either object to or opt out of the settlement agreement, consented to the contract when it was approved by the Chancery Court upon notice to the class members. In nullifying the release that is an integral part of the settlement agreement, the Ninth Circuit ignored Delaware procedures that are designed to assure that a class action settlement is *not* "fundamentally different" from an individual settlement for purposes of preclusion analysis.

The *Epstein* court's conclusion simply cannot be reconciled with *Shutts*. In *Shutts*, this Court held that an opt-out right satisfies the requirements of due process and permits a state court class action to bind out-of-state class members who do not affirmatively consent to the state court's jurisdiction. 472 U.S. at 812-14; *see also id.* at 813 ("[T]he Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so."). If, as *Shutts* holds, a class member's decision not to opt out constitutes "consent" to the jurisdiction of the state court, surely a failure to opt out of a state court class action settlement likewise constitutes effective consent to the settlement.[19] *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (stating that class action procedure

[19] Contrary to this Court's reasoning in *Shutts*, the Ninth Circuit stated that "we would be blind to reality to think that any consent implied by class members in deciding not to opt out is comparable to the consent given by individual plaintiffs in settling their own lawsuits." Pet. App. 39a-40a. *Compare Shutts*, 472 U.S. at 811 (rejecting argument that class members must "opt in" to be bound).

was intended to "bind all class members who did not request exclusion from the suit").

As the Ninth Circuit has held elsewhere:

> [A]ll class members were given the right to opt out *after* being apprised of the terms of the settlement. Appellants were not forced into a position of having to predict whether their interests would be adequately represented. They could determine whether there had been adequate representation of their interests by reviewing the terms of the settlement. If they were dissatisfied, they could opt out of the class.

Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177 (9th Cir. 1977). *See Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191-92 (8th Cir. 1993); *In re Four Seasons Sec. Laws Litig.*, 502 F.2d 834, 843 (10th Cir.) (A right to opt out affords the class "the unique opportunity of judging, retrospectively, whether its interests *had been* adequately represented at a time when it was capable of excluding itself if not satisfied.") (emphasis added), *cert. denied*, 419 U.S. 1034 (1974); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 640 n.9 (N.D. Cal. 1978), *aff'd and op. adopted*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981).

A settlement releasing federal claims on notice and providing a right to opt out works no unwanted or unintended consequences on absent class members. Parties may be unable to predict the future issue or claim preclusive effect of an adjudication, but parties to a settlement know precisely what rights they relinquish. Thus, the members of the class participating in an opt-out settlement make a uniquely informed and voluntary choice. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 792 (3d Cir. 1995) ("Since the plaintiff is offered the opportunity to opt out of the class simultaneously with the opportunity to accept or reject the settlement offer . . . *the plaintiff knows exactly what result he or she sacrifices.*") (emphasis added).

Significantly, prior decisions recognizing that a state court may approve a class settlement releasing exclusively federal

claims involved *non*-opt-out settlements. *See, e.g., Grimes*, 17 F.3d at 1555; *Nottingham*, 925 F.2d at 32; *Sandler*, 818 F. Supp. at 700. *A fortiori*, a state court class action settlement that affords opt-out rights precludes further litigation by class members who fail to opt out of the settlement.[20]

B. Outside the Ninth Circuit It Is Uniformly Held That a State Court May Approve a Class Action Settlement That Includes a Release of Exclusively Federal Claims

Prior to the Ninth Circuit's decision, state and federal case law uniformly held that a state court has authority to approve, as part of a *class settlement*, a release of exclusively federal claims arising out of the same transaction or subject matter that is the basis of the action before it. In *Nottingham,* shareholder class actions were filed first in federal court and later in Delaware Chancery Court. 925 F.2d at 30. The Delaware class representatives agreed to a non-opt out settlement providing non-monetary consideration in exchange for a global release of all state and federal claims arising out of the transactions "referred to in the complaint or the settlement documentation." *Id.* at 31. The federal plaintiffs objected to the settlement in Chancery Court and appealed that court's approval of the settlement to the Delaware Supreme Court,

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[20] Due Process is not at issue here. First, the Ninth Circuit decision is not predicated on any due process concern. Second, the questions of adequacy of representation, notice, and the provision of all requisite due process protections were litigated and decided in the Delaware Chancery Court, which held that the class representation was adequate, notice the best practicable, and the requirements of due process fully satisfied. *See* Pet. App. 73a-74a. These findings are entitled to issue preclusive effect. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Nottingham*, 925 F.2d at 32. Significantly, because the Delaware action sought primarily equitable relief, no opt-out right was required. *See Grimes*, 17 F.3d at 1560 ("[T]he Delaware state court need only have provided 'notice plus an opportunity to be heard and participate in the litigation' in order to satisfy due process.") (quoting *Shutts*, 472 U.S. at 812). Since class members were afforded an opportunity both to object or opt out, the Delaware proceeding afforded *more* than adequate due process. *See Shutts*, 472 U.S. at 811-12; *Eisen*, 417 U.S. at 176.

which rejected their argument that the Chancery Court lacked the jurisdictional power to approve the release of the federal securities law claims. *Id.* (citing *Dana*, 564 A.2d at 1104-05). The federal district court thereafter found that the release validly encompassed the federal claims and granted summary judgment for defendants. The First Circuit affirmed and held:

> It is beyond cavil that a suit can be barred by the earlier settlement of another suit in either of two ways: res judicata or release. The defenses are separate and distinct. . . . The release contained in the *Dana* settlement, by its terms, met all the criteria necessary to engage the gears of the release defense for purposes of this suit: it (1) applied to appellants, (2) encompassed the claims asserted below, and (3) was legally enforceable. [Thus,] further prosecution of appellants' federal suit is foreclosed by the release defense . . . .

Id. at 31-32 (citations omitted). The First Circuit dismissed as "jejune" the contention that a state court cannot approve a class action settlement releasing exclusively federal claims:

> [A]s a matter of federal law, a state court can approve and enforce a settlement which requires a party to release claims actually brought, or potentially "bringable," in federal court under "exclusive jurisdiction" federal statutes even though the state court could not adjudicate claims arising under such statutes.

Id. at 33-34.

In *Grimes*, the Third Circuit likewise enforced a state court non-opt out class action settlement releasing exclusively federal claims pending in a federal court action brought by other members of the settlement class. Affirming the dismissal of the federal claims on the basis of a Delaware release, the Third Circuit honored the parties' intent "to settle all disputes that did or might arise out of the merger transaction" and "interpret[ed] the settlement agreement to release all potential causes of action, even those like the present claims that can only be brought in federal court." 17 F.3d at 1561 n.10. The Court observed that "[a]s a judgment, the settlement and release of claims is a contract that not only is agreed upon by the parties, but also is stamped with the imprimatur of the court with jurisdiction over the parties and the subject matter of the lawsuit." *Id.* at 1557. Like the First Circuit, the Third Circuit concluded that "as a matter of federal law a state court has the power to enter a settlement negotiated by the parties as a judgment which releases exclusive federal claims that the state court could not itself entertain." *Id.* at 1563-64; *see also* note 14, *supra,* and accompanying text.

II. THE FULL FAITH AND CREDIT ACT REQUIRED THE NINTH CIRCUIT TO GIVE EFFECT TO THE DELAWARE JUDGMENT, AND THE RELEASE IT INCORPORATES, AS REQUIRED BY DELAWARE LAW

The Full Faith and Credit Act requires federal courts to give the Delaware judgment the same effect it would be given in a Delaware state court. *See Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484-85 (1813) ("[W]e can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision."); *see also Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518, 525-26 (1986) (reversing and remanding for determination under state preclusion rules of the effect of state court judgment on federal Bank Holding Company Act claim); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 386-87 (1985) (reversing and remanding for determination under state preclusion rules of the effect of state court judgment on exclusively federal antitrust claim); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982).

Under Delaware preclusion law -- ignored by the Ninth Circuit -- a judgment entered on a settlement bars subsequent proceedings resolved by the terms of the settlement, including exclusively federal claims. *Dana*, 564 A.2d at 1105; *In re Union Square Assocs. Sec. Litig.*, Civ. A. No. 11028, 1993 WL 220528, at *3 (Del. Ch. June 16, 1993); *Sternberg v.*

O'Neil, Civ. A. No. 8592, 1989 WL 137932, at *4 (Del. Ch. Nov. 9, 1989).[21]

"[I]n order to qualify for the full faith and credit guaranteed by federal law," the state judgment need only satisfy the minimum procedural due process requirements. *Kremer*, 456 U.S. at 481; *see also Parsons Steel*, 474 U.S. at 523; note 20, *supra*. The law of Delaware is consistent with the general rule that a judgment entered on a settlement is entitled to full effect. *See In re Union Square Assocs. Sec. Litig.*, 1993 WL 220528, at *3; *Sternberg*, 1989 WL 137932, at *4; *Schlaeppi v. Delaware Trust Co.*, 525 A.2d 562, 565 (Del. Ch. 1986), *aff'd*, 523 A.2d 981 (Del.), *cert. denied*, 484 U.S. 826 (1987); *Estrada-Izquierdo v. Aponte-Roque*, 850 F.2d 10, 13, 19 (1st Cir. 1988); *Reiter v. Universal Marion Corp.*, 299 F.2d 449, 452-53 (D.C. Cir. 1962). There is no different rule for judgments incorporating a release. *See, e.g., Nottingham*, 925 F.2d at 34; *Three Rivers Motors Co., Inc. v. Ford Motor Co.*, 522 F.2d 885, 891-92 (3d Cir. 1975). Thus, through the Full Faith and Credit Act, the release embodied in the Delaware judgment operates to bar all former MCA shareholders who did not opt out of the Delaware settlement from prosecuting the claims in this suit.

The Ninth Circuit essentially questioned the *fairness* of the Delaware court's decision. But this is precisely what the Full Faith and Credit Act prohibits. Fairness must be considered *ex ante*, not after a subsequent reversal on a point of law by an intermediate appellate court. *Cf. Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-401 (1981). Moreover, real

[21] Delaware law provides that "[w]hen a state court settlement of a class action releases all claims which arise out of the challenged transaction and is determined to be fair and to have met all due process requirements, the class members are bound by the release or the doctrine of issue preclusion. Class members cannot subsequently relitigate the claims barred by the settlement in a federal court." *In re MCA, Inc. Shareholders Litig.*, 598 A.2d 687, 691 (Del. Ch. 1991) (citations omitted); *see also Dana*, 564 A.2d at 1104 (law "uniformly" holds that state court can release exclusively federal claims).

fairness and justice lie in holding parties to their bargains and choices, and respecting the finality of judgments. *Id.* at 401 ("This Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' ") (citations omitted).

A. The Ninth Circuit Decision Undermines Basic Principles of Federalism

The principles underlying full faith and credit are constitutional. The Framers understood that full recognition of sister state judicial proceedings was an essential component of federalism. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703-04 (1982). To encourage the sense of federation among the states, the Framers included a clause in the Constitution requiring each state to give "Full Faith and Credit . . . to the public acts, records, and judicial proceedings of every other state." U.S. Const., art. IV, § 1. James Madison argued that the Full Faith and Credit clause was indispensable to promote "harmony and proper intercourse among the States" and was "a very convenient instrument of justice." The Federalist No. 42, at 267, 271 (James Madison) (Clinton Rossiter ed., 1961).

The first Congress enacted the Full Faith and Credit Act in 1790 "specifically to insure that federal courts . . . would be bound by state judgments." *Kremer*, 456 U.S. at 483 n.24; *see also Davis v. Davis*, 305 U.S. 32, 40 (1938). The Act ensures the "comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *see also Growe v. Emison*, 113 S. Ct. 1075, 1082 (1993) (Full Faith and Credit Act embodies "elementary principles of federalism and comity").

Mindful of the federalist plan, this Court has consistently sought to promote:

> the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire

> country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideas and dreams of "Our Federalism."

Younger v. Harris, 401 U.S. 37, 44 (1971); *see also Underwriters Nat'l Assurance Co.*, 455 U.S. at 703-04 ("Ours is a union of states, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it.").[22] The primary interest of the states in certain matters, including the regulation of corporate affairs of entities transacting business under state auspices, heightens the need for state court autonomy. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) ("No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations.").

Recognizing that "an intrusion upon state judicial authority deeply implicates the principles of comity and may impair the smooth workings of our federal system," *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 513 n.17 (1982), this Court historically has sought to protect state sovereignty against unwarranted federal encroachment in a broad variety of contexts:

- Holding that lower federal courts have no statutory authority to directly or indirectly review state court judgments. *See, e.g., Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

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[22] Congress has advanced these principles by codifying statutory limitations on federal court power to disrupt or review state court proceedings. *See, e.g.*, 28 U.S.C. § 2283 (the Anti-Injunction Act); 28 U.S.C. § 2254(b) (the statutory branch of the habeas corpus exhaustion requirement); 28 U.S.C. § 1341 (the Tax Injunction Act); 28 U.S.C. § 1342 (the Johnson Act).

- Limiting the availability of federal injunctive or declaratory relief against state civil and criminal proceedings. *See, e.g., Pennzoil Co v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987) (abstention doctrines "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes"); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432-34 (1982) (state attorney disciplinary proceedings); *Juidice v. Vail*, 430 U.S. 327, 338 (1977) (state civil contempt proceedings); *Younger*, 401 U.S. at 43-44 (state criminal proceedings).

- Abstaining from the exercise of federal jurisdiction to allow state courts to function without interference. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("'[w]ise judicial administration . . . conservation of judicial resources and comprehensive disposition of litigation'" counsel staying federal action where a related state proceeding is pending); *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) ("a sound respect for the independence of state action requires the federal equity court to stay its hand").

- Requiring litigants to exhaust state remedies before seeking relief in federal court. *See, e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610 (1975).

The Ninth Circuit held that "federal pre-emption" overrides the Full Faith and Credit Act and permits a federal court to deny full faith and credit to a state court judgment incorporating a class release of exclusively federal claims where "Congress has expressly denied state courts jurisdiction over an important area of federal law." Pet. App. 28a n.25. But federal preemption is not implicated by the judicial approval of a settlement. The mechanism by which the federal claims were released here is the execution by private parties of a contract which was approved by the court. *See American Airlines, Inc. v. Wolens*, 115 S. Ct. 817, 824 (1995) (courts should be reluctant to imply federal preemption that would nullify enforcement of private parties' contracts); *cf. Cohen*, 1995 WL 444436, at *3. Federal preemption is implicated

when the scope of a federal statute indicates that Congress intended to centralize *all* authority over the regulated area in the federal government. *See Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I.*, 113 S. Ct. 1190, 1194 (1993).[23]

This Court has found preemption of state court *adjudicatory* authority only in rare instances required by a congressional scheme. Thus, in *Brown v. Felsen*, 442 U.S. 127 (1979), this Court found that the grant of exclusive jurisdiction under § 17 of the former Bankruptcy Act "require[d] creditors to apply to the bankruptcy court for adjudication of certain dischargeability questions," *id.* at 129-130, because Congress had manifested an unequivocal intention "to take these § 17 claims away from state courts." *Id.* at 136. Since the Constitution vests in Congress plenary authority, exclusive of the states, to make uniform bankruptcy laws, *see* U.S. Const., art. I, § 8, cl. 4, and since Congress has established specialized bankruptcy courts to develop and apply uniform bankruptcy law, *see* 28 U.S.C. § 151, *et seq.*, giving full faith and credit to the state court judgment adjudicating dischargeability questions "would undercut Congress' intention to commit § 17 issues to the jurisdiction of the bankruptcy court." *Id.* at 135.

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[23] This Court has "never assumed lightly that Congress has derogated state regulation, but instead [has] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995); *see CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("pre-emption will not lie unless it is 'the clear and manifest purpose of Congress'") (citation omitted); *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990) ("'Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of material concern. That cannot mean, however, that every federal statute ousts all related state law.'") (citation omitted). No authority has ever suggested that the Exchange Act preempts state involvement in securities regulation, and for good reason; section 28(a) of the Exchange Act expressly states that Congress did *not* intend to displace state involvement. *See* 15 U.S.C. § 78bb(a).

The factors that in *Brown* warranted a departure from standard preclusion principles have no analog in the case of a state court judgment approving a private contract of release. Congress has manifested no intent to oust state courts of their authority to approve class settlements -- and only class settlements -- in cases properly pending before them. *See* 15 U.S.C. § 78bb(a) (rights and remedies created by Exchange Act are in addition to those existing independent of the Act). No conceivable federal interest could be advanced by withholding full faith and credit from a state court judgment entered upon a class action settlement that permits class members to preserve their ability to assert federal securities law claims by opting out of the settlement. Indeed, undoing the state class action settlement would unjustifiably eviscerate the federal policy of promoting consensual resolutions of disputes.

B. The Grant to Federal Courts of Exclusive Jurisdiction to Adjudicate Exchange Act Claims Does Not Create an Implied Repeal of § 1738 for a State Court Judgment Entered on a Settlement Releasing Exclusively Federal Claims

The Ninth Circuit never undertook to determine whether the text or legislative history of the Exchange Act or Williams Act, the amendment to the Exchange Act pursuant to which Rule 14d-10 was promulgated, *see* note 25, *infra*, could support a finding of an implied repeal of the Full Faith and Credit Act for state court judgments approving opt-out class action settlements. They do not. Nor does anything inherent in an "exclusive" grant of federal jurisdiction even remotely suggest an implied repeal of the Full Faith and Credit Act in the context of a court-approved settlement releasing federal claims.

Section 1738 presumptively applies to *all* state judgments. *Marrese*, 470 U.S. at 381; *Kremer*, 456 U.S. at 468, 481-82. "[A]n exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 468; *see also Marrese*, 470 U.S. at 381. The Exchange Act does not expressly repeal § 1738. *See Murphy v. Gallagher*, 761 F.2d 878, 884-86 (2d Cir. 1985).

Implied repeals "are not favored." *Kremer*, 456 U.S. at 468 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). Congress is deemed aware of § 1738 and its consistent application in the courts when enacting federal laws subsequent to passage of the Full Faith and Credit Act. *See, e.g., University of Tennessee v. Elliot*, 478 U.S. 788, 796-97 (1986); *Allen*, 449 U.S. at 97-98. Thus, absent a clear indication that Congress intended a repeal of § 1738, or a "manifest incompatibility" between § 1738 and a later statute, the Court will infer that Congress did not intend to disturb the operation of § 1738. *See, e.g., Kremer*, 456 U.S. at 473 (no implied repeal unless a court finds that "Congress considered it necessary or desirable to provide an absolute right to relitigate an issue resolved by a state court").[24] This presumption imposes a "rigorous standard" for parties seeking to establish an implied repeal, and any doubts should be resolved against "overrid[ing] the historic respect that federal courts accord state court judgments." *Id.* at 471-72 & n.10; *see also Marrese*, 470 U.S. at 381 (presumption favoring § 1738 governs even "in a lawsuit involving a claim within the exclusive jurisdiction of the federal courts").

The legislative history of the Exchange Act provides no suggestion that Congress intended to create an exception to § 1738 for a state court judgment entered on a settlement releasing exclusively federal claims. *See Murphy*, 761 F.2d at 885 (Exchange Act does not impliedly repeal § 1738). Indeed, it is recognized that the creation of exclusive jurisdiction in

[24] The habeas corpus exception to the mandate of Full Faith and Credit -- the only express statutory exception to § 1738 recognized by this Court -- "finds its source in the unique purpose of habeas corpus -- to release the applicant for the writ from unlawful confinement." *Allen*, 449 U.S. at 98 n.12; *see also Sanders v. United States*, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."). But even in the habeas corpus context, Congress and this Court have carefully circumscribed the scope of federal habeas corpus review in deference to the integrity of state courts and to avoid unnecessary state-federal friction. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976).

Section 27 of the Exchange Act, 15 U.S.C. § 78aa, was "pure happenstance." American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 183 (1969) (calling for elimination of exclusive federal jurisdiction under the 1934 Act); *see also In re TransOcean Tender Offer Sec. Litig.*, 427 F. Supp. 1211, 1219 (N.D. Ill. 1977) (legislative history of 1934 Act is "unedifying as to the Congressional motive for vesting exclusive jurisdiction in the federal courts").[25]

This Court has consistently rejected arguments that federal statutes limit the scope of § 1738. *See Migra,* 465 U.S. at 84

[25] Early versions of the House bill failed to indicate whether jurisdiction was to be exclusive or concurrent. *See* H.R. 7852, 73rd Cong., 2d Sess., § 25 (1934). An intermediate version explicitly mandated concurrent Exchange Act jurisdiction. *See* H.R. 7924, 73rd Cong., 2d Sess., § 6(a) (1934). The bill finally reported out of the House Committee on Interstate and Foreign Commerce simply provided that "[t]he district courts of the United States . . . shall have jurisdiction of violations of this Act . . ." H.R. 9323, 73rd Cong., 2d Sess., § 26 (1934). With virtually no floor debate, the bill was amended to authorize exclusive federal jurisdiction. *See* 78 Cong. Rec. 8099 (1934); H.R. 9323, 73rd Cong., 2d Sess., § 26 (1934) (bill passed by House). The language of the Senate bill specified neither exclusive federal jurisdiction nor concurrent jurisdiction. *See* S. 3420, 73rd Cong., 2d Sess., § 26 (1934). During the debate the Senators were unable to determine the intent of the Committee on Banking and Currency. Aware of the exclusive jurisdiction language of the amended House version, the Senate decided to leave the ambiguity for the Conference Committee to resolve. 78 Cong. Rec. 8571 (1934) (remarks of Senators Steiwer, Fletcher and Byrnes). Without debate, the Conference Committee adopted the House version which became § 27 of the 1934 Act. *See* 78 Cong. Rec. 9939 (1934); S. Doc. No. 185, 73rd Cong., 2d Sess., § 23 (1934).

Congress enacted the Williams Act in 1968 as an amendment to the Exchange Act. *See Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985). Neither the express terms of the Williams Act nor its legislative history makes reference to the jurisdiction of the federal courts. And, this Court has recognized that the Williams Act does not preempt state regulation of tender offers. *See CTS Corp.*, 481 U.S. at 86 ("The longstanding prevalence of state regulation in this area suggests that, *if Congress had intended to pre-empt all state laws that delay the acquisition of voting control following a tender offer, it would have said so explicitly.*") (emphasis added). Thus, the Williams Act furnishes no basis for an implied repeal of § 1738 independent of the Exchange Act.

(the interplay between § 1738 and 42 U.S.C. § 1983 "embodies the view that it is more important to give full faith and credit to state court judgments than to ensure separate forums for federal and state claims");[26] *see also Marrese*, 470 U.S. at 385-86 (the force of § 1738 "certainly [is] not made less compelling because state courts lack jurisdiction over federal antitrust claims"); *Kremer*, 456 U.S. at 463, 476 (Title VII does not "supersede the principles of comity and repose embodied in § 1738"); *Allen*, 449 U.S. at 97-98 (no basis to find that the creation of a federal cause of action under § 1983 impliedly repeals the Full Faith and Credit Act).[27]

C. Respondents Were Barred from Initiating, and the Ninth Circuit Should Not Have Entertained, a Collateral Attack on the Delaware Court's Determination of Its Own Authority to Approve the Settlement

Respondents chose to stand by and not object to the settlement in the Delaware court, after receiving notice of the settlement and an opportunity to be heard.[28] These strategic

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[26] The Ninth Circuit relied on this Court's decision in *Newton v. Rumery*, 480 U.S. 386, 392 (1987), for the proposition that a release need not be enforced if the public interest in favor of settlements was outweighed by a competing federal interest. Pet. App. 40a n.33. *Newton* involved "a question important to the administration of criminal justice," namely an individual's release of potential 42 U.S.C. § 1983 claims in exchange for the dismissal of pending criminal charges. 480 U.S. at 392. This Court nevertheless *enforced* the release. *See Newton*, 480 U.S. at 394-97.

[27] The competence of the state courts to address securities law issues cannot be questioned. Every state has enacted a securities act, *see* Thomas Hazen, *The Law of Securities Regulation* 219 (1985), and a majority of states has adopted the Uniform Securities Act, which borrows much of its language and many of its standards from the federal securities laws. *See* Note, *The Securities Exchange Act and the Rule of Exclusive Federal Jurisdiction*, 89 Yale L.J. 95, 112 (1979).

[28] Respondents' counsel characterized their decision not to appear in Delaware as follows:

> We *thought* about opposing in Delaware. If we went to Delaware to oppose it what prevents defendants from offering these same lawyers a better settlement, but one we still consider inadequate. . .

(Footnote continued)

decisions bar respondents from mounting any "back door" challenge to the terms of the settlement in federal court. If respondents had objections to the authority of the Delaware courts to release federal claims, they should have raised them in the Delaware courts.[29] Having failed to raise an appropriate direct challenge to the authority of the Delaware courts, respondents are foreclosed from collaterally attacking the Delaware judgment.[30] "The need for finality within our federal

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> . . Frankly, we thought it unlikely that Vice Chancellor [now Justice] Hartnett would approve such a settlement.

R. 57 at 16 (emphasis added).

[29] By in effect overruling the Delaware courts' determinations regarding the capacity of the parties to contract, the adequacy of representation and the fairness of the settlement (and directing the certification of a federal class consisting almost entirely of MCA shareholders who had released their claims for consideration), the Ninth Circuit exercised appellate review of the final judgment of the Delaware Supreme Court in derogation of the *Rooker-Feldman* doctrine. *See Rooker*, 263 U.S. at 415 (state court's "decision, whether right or wrong, was an exercise of jurisdiction. If the [state court] decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification *in an appropriate and timely appellate proceeding*") (emphasis added); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 (1983) (lower federal courts "possess no power whatever to sit in direct review of state court decisions" and may not review any issue actually decided by a state court or any issue "inextricably intertwined with the state court's" determination).

[30] The Ninth Circuit recognized that (1) a collateral attack on a state court's determination of its own authority is not generally permitted, Pet. App. 28a n.25 (citing *Durfee v. Duke*, 375 U.S. 106, 111 (1963)), and (2) that the Delaware court had "determined that it was jurisdictionally competent to enter a judgment settling the class action." *Id.* Nevertheless, the Ninth Circuit concluded that "the policy of finality of judgments is plainly outweighed" when a state court "exercise[s] judicial power over" exclusively federal claims. *Id.* However, no federal interest is implicated when a state court approves a release of a federal claim. *See* Point I, *supra*. Moreover, this Court has confirmed that the rule that jurisdictional determinations are final applies even where the reviewing court has "exclusive jurisdiction over the subject matter of th[e] litigation." *Underwriters Nat'l Assurance Co.*, 455 U.S. at 705 n.11. While *Durfee* recognized that extraordinary circumstances might exist in which the doctrine of federal preemption would override the general rule of finality, this Court has actually recognized such an exception only in the context of

(Footnote continued)

system . . . applies with equal force to questions of jurisdiction." *Underwriters Nat'l Assurance Co.*, 455 U.S. at 706 n.13; *see Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 296 (1970) (if a party to a state court proceeding "was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the [state] appellate courts and ultimately, if necessary, in this Court."); *Nottingham*, 925 F.2d at 33 ("If, having objected and been overruled, appellants were still dissatisfied with the Delaware judgment, their recourse was to the United States Supreme Court by means of certiorari, not to the lower federal courts in the vain pursuit of back-door relief.").

Respondents should not be permitted to deliberately wait out the state court proceedings. "A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding." *Underwriters Nat'l Assurance Co.*, 455 U.S. at 710. As was held with similar force in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*:

> A party that has had an *opportunity* to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations -- both subject matter and personal.

456 U.S. 694, 702 n.9 (1982) (emphasis added) (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938)).

In short, respondents were "obliged to advance [their] argument that the [Delaware] Court did not have the authority to settle [the exclusively federal claims] when it was given the opportunity to do so" in Delaware. *Underwriters Nat'l Assurance Co.*, 455 U.S. at 710. Respondents, self-styled fiduciaries, regarded the Delaware proceedings dismissively. With

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proceedings under the Bankruptcy Act and only then when a state court purported to *adjudicate* matters within the federal courts' plenary authority. *See Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940).

full knowledge of their opportunity to object to or opt out of the Delaware proceedings, they chose to do neither. The consequences of that arrogant strategy cannot later be remedied on collateral attack and cannot serve as the predicate for the Ninth Circuit's erroneous and unprecedented interference with the Delaware judgment.

III. THE NINTH CIRCUIT TEST FOR DETERMINING THE PRECLUSIVE EFFECT OF A STATE COURT SETTLEMENT RELEASING FEDERAL CLAIMS IS ENTIRELY MISDIRECTED AND UNWORKABLE

The Ninth Circuit held that "a court's jurisdiction to extinguish claims by class settlement should not exceed its jurisdiction to extinguish claims by adjudication." Pet. App. 34a. Thus, under the Ninth Circuit's analysis a state court could approve the release of exclusively federal claims in individual and derivative suits, but it could not do so in class suits unless such claims "*would have been extinguished by the issue preclusive effect* of an adjudication of the state claims." Pet. App. 33a (emphasis added).

The Ninth Circuit's analysis conflates the separate concepts of release and issue preclusion. A release is the contractual relinquishment of a right by a party or its representative. Black's Law Dictionary 1289 (6th ed. 1990). A release is given legal effect under the regime of state contract law. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 2003 (1994); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1677 (1994) ("enforcement of settlement agreement is for state courts"); *PMX Indus., Inc. v. LEP Profit Int'l*, 31 F.3d 701, 703 (8th Cir. 1994) ("A release or settlement agreement is a contract, and is construed under the legal principles applicable to the construction and interpretation of contracts."). When a release is embodied in a state court judgment it must be accorded full faith and credit. *See Grimes*, 17 F.3d at 1561-63. In contrast, issue preclusion is a judicial doctrine that bars "relitigation of issues *actually* litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)

(emphasis added) (citations omitted); *see also Marrese*, 470 U.S. at 376 n.1.

The Ninth Circuit's analysis is thus fundamentally misdirected: if what a court can *adjudicate* controls the parameters of what *the parties* can consensually decide to *release*, the defense of release will be subsumed by issue preclusion. *Nottingham*, 925 F.2d at 34 ("[u]nless the [release] defense is to be written off as some vestigial remnant of an abandoned jurisprudence -- and we think any such suggestion is fanciful" -- independent effect must be given to a release of federal claims). The invalidity of the Ninth Circuit's "jurisdictional" analysis is underscored by the court's acknowledgement that state courts have the power to approve the settlement of exclusively federal claims in individual and shareholder derivative suits. *See* Pet. App. 37a-38a & n.32. If the Supremacy Clause prohibited a state court from resolving exclusively federal claims as a matter of jurisdictional *power*, a state court plainly could not approve the settlement of exclusively federal claims in *any* context, including in individual and derivative actions.

A. The Ninth Circuit's Limitation on the Preclusive Effect of a Negotiated Release Has No Basis in Prior Law

The Ninth Circuit asserted that *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981), and *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982), "together provide the doctrinal framework for using issue preclusion" to limit the authority of a state court to approve a negotiated release. Pet. App. 33a. This assertion is demonstrably wrong. *National Super Spuds* and *TBK* address the authority of class representatives, *not* the power of a state court. Moreover, these cases confirm the capacity of authorized class representatives to release on behalf of class members *any* claims that they possess in common with other class members -- even in the absence of an opt-out right. Nothing in *National Super Spuds* or *TBK* remotely suggests that issue preclusion has any bearing on -- much less restricts -- the scope of class action releases that may be negotiated by authorized representatives.

In *National Super Spuds*, a federal district court certified a class of persons who *liquidated* certain potato future contracts between April 13 and May 7, 1976. *See* 660 F.2d at 16. Thereafter, a state court class action was brought on behalf of persons who held *unliquidated* potato future contracts *after* May 7, 1976. *Id.* at 13. Although the federal class representatives "did not purport to represent members of the class or anyone else with respect to [state] claims based on unliquidated contracts," they entered into a settlement agreement and release that purported to encompass the unliquidated contracts. *Id.* at 17. The consideration paid for the release did not reflect any additional payment for the release of claims based on unliquidated contracts. *Id.* at 18. Since the settlement notice was sent to the class consisting of persons who liquidated their potato future contracts, members of the state class were unaware that approval of the federal settlement would result in the release of claims relating to the unliquidated contracts. *Id.* at 16. Enforcing a cardinal principle of due process (embodied in the commonality and typicality requirements of Fed. R. Civ. P. 23) that "named plaintiffs in a class action 'cannot represent a class of whom they are not a part,' " the Second Circuit held that the federal district court could not approve a settlement releasing claims based on unliquidated contracts because no class representative held such a claim. *Id.* at 17 (citation omitted).

National Super Spuds forbade the release of claims that "were not within the description of claims assertable by the class," *id.* at 19, as against absent members whom the named plaintiffs did not represent in connection with those claims and who received *no notice* of the proposed release. *National Super Spuds* thus demonstrates the established principle, fully applicable here, that class settlements may only discharge claims which the class representatives "possess in common with other members of the class" based upon the same set of facts. *Id.* at 16. *See also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 632 n.18 (9th Cir. 1982) ("where a particular type of relief potentially available to the class members is compromised in the settlement process, it is mainly irrelevant whether or not that relief was specifically

requested in the complaint"), *cert. denied*, 459 U.S. 1217 (1983).

In *TBK*, the Second Circuit reaffirmed the holding of *National Super Spuds* in the context of a non-opt-out settlement that released claims of class members that the court assumed it could *not* adjudicate. *TBK*, 675 F.2d at 459-60 ("in order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate [*i.e.*, the merger transaction at issue in both cases] as that underlying the claims in the settled class action *even though the claim was not presented and might not have been presentable in the class action*") (emphasis added); *accord National Super Spuds*, 660 F.2d at 18 n.7 ("We assume that a settlement could properly be framed so as to prevent class members from subsequently asserting claims relying on a legal theory different from that relied upon in the class action complaint but depending upon the very same set of facts"). As long as "all class members ha[ve] the same interest in maximizing the value" of the released claims, and "the settlement treats all class members identically," *TBK*, 675 F.2d at 462, the settlement is effective.[31] As *TBK* makes clear,

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[31] Adequacy of representation is not an issue in this case. Adequate representation requires that the named parties must "'be part of the class and possess the same interest and suffer the same injury' as the class members," *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (citation omitted), so "that the interests of the class members will be fairly and adequately protected in their absence." *Id.*, at 158 n.13. Here, the state class (all MCA shareholders as of September 25, 1990, and thereafter) included the federal class (all MCA shareholders as of November 3, 1990). And, as the Ninth Circuit acknowledged, "[t]he claims of every tendering shareholder turn on identical facts and law." Pet. App. 41a. By advancing their own interests, the named plaintiffs furthered the interests of the class: maximizing the award they could obtain regardless of legal theory. *See In re United Energy Corp. Solar Power Modules Tax Shelter Inv. Sec. Litig.*, 122 F.R.D. 251, 256 (C.D. Cal. 1988); 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.13 at 3-75 (3d ed. 1992).

(Footnote continued)

National Super Spuds does *not* support "applying an issue preclusion test to limit the preclusive effect of a judgment approving a class settlement" — as the opinion below erroneously asserts. Pet. App. 31a. *National Super Spuds* rejected a class settlement that purported to extinguish certain claims that could not have been extinguished by a judgment after trial for the reason that the named plaintiffs did not possess the claims and the claims arose out of separate transactions.[32]

Adequate representation also requires that class counsel be competent to pursue the action. *General Tel.*, 457 U.S. at 157-58 n.13; *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). The Delaware Chancery Court authorized the class representatives to represent all former MCA shareholders at the hearing scheduled to consider the fairness of the settlement. The professional competence of the court-appointed Delaware class counsel to prosecute a securities class action is indisputable. Court-appointed co-lead counsel for the Delaware class included two of the most preeminent shareholder litigation firms in the nation. These law firms are reported on Westlaw as having been court-approved plaintiff class representatives in scores of cases. Moreover, based on pretrial discovery in the Delaware action and their own analysis of the governing law, the co-lead counsel (and the other law firms comprising the Delaware plaintiffs' Committee of the Whole) were in a position to evaluate the merit -- and lack thereof -- of the Rule 14d-10 claim. See J.A. 273. If Delaware class counsel had concluded that the federal claims had greater value than the settlement consideration, it would have been in the interests of the class they represented, which included respondents -- as well as their own financial interest -- to reject the settlement and to assert the federal claim in federal court.

[32] The Ninth Circuit appropriated the "identical factual predicate" language of *TBK* as support for its doctrinally invalid fusion of issue preclusion and release. *TBK* employed the "identical factual predicate" inquiry only to ensure, as a matter of due process, that a commonality of interest existed among class members such that "the settlement treats all class members identically." 675 F.2d at 462. *TBK* looked to ascertain whether the "core" or "the gravamen" of the claims possessed by the class representative were "realistically identical" to those held by other class members, to insure that their interests coalesced. *Id.* at 460-61. The Second Circuit's statement in *National Super Spuds* that "[i]f a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such action ordinarily should not be able to do so either," 660 F.2d at 18, does not support the Ninth Circuit's issue preclusion restriction on the effect of a release. As the Second Circuit made clear in *TBK*, its comment in *National Super Spuds* was

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The Ninth Circuit also mischaracterized *Grimes* and *Nottingham* by stating that those courts applied an issue preclusion test (*i.e.*, an "identical factual predicate" test) to determine the preclusive effect of a release. Pet. App. 33a.[33] But *Grimes* and *Nottingham* specifically rejected the notion that other preclusion doctrines could limit the scope of a negotiated release. *Grimes*, 17 F.3d at 1563 ("We need not address [res judicata effect of state court settlement] because the district court expressly ruled that the federal claims had been released as a part of the state court judgment"); *Nottingham*, 925 F.2d at 34 ("since the Delaware class action settlement could release federal claims over which the state court had no jurisdiction, *i.e.*, claims which would not be barred by the res judicata effect of the judgment containing the release . . . *the effect of the release was not circumscribed by the doctrine of res judicata*") (emphasis added). In accordance with the mandate of the Full Faith and Credit Act, *Grimes* and *Nottingham* properly applied Delaware preclusion principles to contractual *releases* of federal securities claims incorporated in non-opt out state court judgments *independent* of any issue preclusive effect of the state litigations.[34]

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directed at a circumstance, as in *National Super Spuds*, where a class settlement purported to extinguish claims that could not have been adjudicated by a judgment after trial because the named plaintiffs did not have the claims and the claims arose out of different facts.

[33] *Grimes* and *Nottingham* both held that issue preclusion doctrine separately precludes relitigation of facts determined by the state courts pertaining to due process, such as the adequacy of representation and the fairness of the settlement. *See Grimes*, 17 F.3d at 1562; *Nottingham*, 925 F.2d at 32.

[34] The releases in the state actions in *Grimes* and *Nottingham* extended to all matters "arising out of" specified transactions -- without referring to a specific federal complaint. The *Grimes* and *Nottingham* courts were required to analyze under Delaware preclusion principles whether the state and federal claims "arose out of the same transaction" or "shared a common gravamen" in order to ascertain whether the federal action was within the scope of the Delaware release. Here, because the Chancery Court final judgment *specifically* embodied the release of the claims asserted in respondents' action such inquiry is unnecessary. Moreover, in assessing the scope of the release in federal court, the Full Faith and

(Footnote continued)

B. The Ninth Circuit's "Issue Preclusion" Test Is Unworkable

The Ninth Circuit's issue preclusion test is not only doctrinally unsupportable, it is also unworkable, as the court's decision illustrates. The Ninth Circuit decision recognizes that the Delaware state claims included the claim that the MCA officers had "breached their fiduciary duty of loyalty by making preferential arrangements for themselves as part of the tender offer." Pet. App. 36a. The decision likewise acknowledges that "[a]t first glance" this claim "appears to be at least in the same ball park as the Rule 14d-10 claim." *Id.* The opinion then sought to escape from the issue preclusion test it had fashioned ("would have been extinguished by the issue preclusive effect of an adjudication of the settlement claims"). The escape, oddly, was that the state court would not and could not have occasion to adjudicate an issue that would also arise in the exclusively federal claim. As the court stated, "no Delaware *statutory or common law rule* . . . prohibits a shareholder from obtaining the best deal possible for himself as part of a change of corporate control," and therefore concluded that "adjudication of the claim would not have raised a question of *fact* concerning whether Wasserman or Sheinberg received preferential treatment from Matsushita." *Id.* at 36-37a (emphasis added). Thus, in the Ninth Circuit's view, in order to determine the preclusive effect of a state court class settlement, the federal court must engage in an exceedingly detailed, *post hoc* hypothetical reconstruction of how the state action would have been "adjudicated" had it not been settled.[35] As noted, however, concepts of preclusion predicated

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Credit Act required the Ninth Circuit to apply Delaware preclusion law. *See* Point II, *supra*, at 25. Delaware gives effect to a release according to its terms and recognizes a release of all state and federal claims arising from the same transaction. *See* Point II, *supra*, at 25-26. The Ninth Circuit acknowledged that the state and federal claims here arise from the same transaction. *See* Pet. App. 34a.

[35] Contrary to the Ninth Circuit analysis, Delaware law prohibits a corporate officer or director from using his position to obtain preferential treatment to the disadvantage of the shareholders in a change of corporate

(Footnote continued)

on *adjudication* are simply not germane to the effect of a *release* which, by definition, is a contractual undertaking that involves no adjudication.

The Ninth Circuit's issue preclusion test would place federal courts in the impossible position of having to determine which state claims would have been adjudicated by the state court on a *legal* basis and which on a *factual* basis (and, presumably, on which basis the hypothetical "adjudicating" state

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control. *See Citron v. Steego Corp.*, Civ. A. No. 10171, 1988 WL 94738, at *7 (Del. Ch. Sept. 9, 1988) (holding that a director-shareholder may not use "his corporate office to advantage himself in a way denied to other shareholders"); *see also Endervelt v. The Nostalgia Network, Inc.*, Civ. A. No. 11415, 1991 WL 137148, at *4 (Del. Ch. July 23, 1991) (citing *Citron*). Thus, there is no basis for the Ninth Circuit's assumption that the factual issue of preferential treatment would not have been adjudicated in state court. A factual finding of no preferential treatment would have precluded liability on the class's duty of loyalty claim. Moreover, Matsushita and the other defendants in the Delaware action were fully prepared to argue, in defense of the state fiduciary duty claim, not only that as a legal matter an insider may bargain for a preference for his or her shares not available to the public as long as the sale does not disadvantage other shareholders, but also that the Wasserman preferred stock was not more valuable than the public tender offer price. Had defendants in the Delaware action prevailed on the valuation issue, that determination would preclude the recovery of damages under the federal Rule 14d-10 claim. Similarly, the Delaware non-disclosure claims alleging, *inter alia*, a failure to disclose that Mr. Wasserman purportedly received consideration more valuable than the tender offer price would necessarily have entailed proof of the predicate fact of higher value, an issue that is central to respondents' Rule 14d-10 claim. Finally, the defendants in Delaware were prepared to demonstrate that the Sheinberg payment was not in consideration for his MCA shares -- a conclusion that would negate any Rule 14d-10 claim based on that payment. Thus, the core factual predicate underlying the state claims embodies essential elements of the federal claims. As pleaded and released, the state claims depended on, *inter alia*, whether "the [acquisition] also provides for substantial payments and other benefits for [Wasserman and Sheinberg] that will not be shared by MCA's public stockholders," specifically including Mr. Wasserman's receipt of preferred stock. J.A. 145. Accordingly, even under the Ninth Circuit's own test, the factual predicate of the state claims encompasses predicate facts necessary to support the federal claims and would thus lead to issue preclusion in the federal court had they been adjudicated.

court would have ruled upon a claim challenged on *both* grounds). The federal court would be required to undertake this inquiry regardless of the stage at which the state action was settled, even if no discovery had occurred to develop and test the allegations of the complaint. Under this test, the preclusive effect of a state court settlement would then depend on the outcome of some federal court's resolution of these hypotheticals. The decision thus injects a vast element of uncertainty and intricacy into the previously straightforward task of measuring the preclusive effect of state court class settlements.

The Ninth Circuit's issue preclusion analysis of a negotiated release thus operates to defeat the expectations and intentions of the parties to a consensual settlement. One of the chief advantages of a volitional settlement is that it permits the parties to define their rights precisely, and eliminate as completely as the negotiated language they employ permits, any unintended consequences that may follow adjudications, such as the uncertain issue preclusive effect of an adjudication in subsequent proceedings. By introducing the uncertainties surrounding the preclusive effect of an adjudication into a negotiated settlement, the Ninth Circuit's decision directly interferes with the ability of settling parties to determine conclusively the meaning of their agreement and embody that meaning in a court-approved settlement.

IV. THE NINTH CIRCUIT'S DECISION DISCOURAGES COMPREHENSIVE CLASS ACTION SETTLEMENTS, UNDERMINES THE FINALITY OF JUDGMENTS, PERMITS PARTIES TO ABROGATE THEIR SETTLEMENT CONTRACTS, AND PROMOTES UNNECESSARY LITIGATION IN THE FEDERAL COURTS

In addition to advancing comity, the recognition of state court judgments approving class action settlements promotes consensual resolution of complex litigation, advances finality interests, holds litigants to the bargains they voluntarily make, conserves federal judicial resources and discourages duplicative and vexatious litigation. The Ninth Circuit's decision undermines each of these objectives.

A. Encouraging Settlements

Federal courts should facilitate -- not undermine -- the settlement of litigation. *See, e.g.*, *McDermott*, 114 S. Ct. at 1467-69 (adopting proportionate share approach to judgment reduction because, *inter alia*, it promotes "public policy [that] wisely encourages settlements" and unitary disposition of litigation). There is no reason to believe that class action settlements reached under the supervision of state courts are in any respect less important, less reasonable or less fair than those reached under federal supervision. The Ninth Circuit's decision, however, assures that there will be fewer state court class action settlements. Simply stated, the Ninth Circuit decision prevents parties to a state class action from achieving a comprehensive settlement whenever the transactions and events at issue might also form the basis for an exclusively federal claim.[36]

Settlements are an important mechanism for resolving "mass litigation." *See, e.g.*, *In re General Motors Corp.*, 55 F.3d at 778, 784 ("[I]ncreased use of settlement classes has proven extremely valuable for disposing of major and complex national and international class actions in a variety of substantive areas ranging from toxic torts (Agent Orange) and medical devices (Dalkon Shield, breast implant), to antitrust cases (the beef or cardboard container industries) . . . . Courts

[36] The decision below will affect a wide variety of cases in which facts underlying state law claims may also form the basis of exclusively federal claims, such as Admiralty, 28 U.S.C. § 1333; Antitrust, 15 U.S.C. § 1; Commodity Exchanges, 7 U.S.C. § 25(c); CERCLA, 42 U.S.C. § 9613(b); Patent and Copyright, 28 U.S.C. § 1338; Securities, 15 U.S.C. § 78aa; and Single Employer Plans Under ERISA, 29 U.S.C. § 1370 (West Supp. 1995). *See, e.g.*, *Minnesota v. Mid-Minn. Associated Physicians*, No. C7-91-558, 1991 WL 340170, at *3 (Minn. Dist. Ct. July 2, 1991) (consent judgment releasing, *inter alia*, federal antitrust claims); *Texas v. Coca-Cola Bottling Co. of the Southwest*, No. 84C1-15586, 1986 WL 22186, at *3 (Tex. Dist. Ct. July 1, 1986) (final judgment releasing, *inter alia*, federal antitrust claims); *Delaware v. Mid-Atlantic Paving Co.*, Civ. A. No. 7197, 1983 WL 14930, at *2 (Del. Ch. June 24, 1983) (final judgment and consent decree releasing, *inter alia*, federal antitrust claims).

should favor the use of devices that tend to foster negotiated solutions to these actions"); *cf. Malcolm v. National Gypsum Co.*, 995 F.2d 346, 348 (2d Cir. 1993) ("One of the greatest challenges facing both state and federal courts is the crush of tort suits arising from the extensive use of asbestos . . . throughout much of this century"); *see generally Mattoon v. City of Norman*, 633 P.2d 735, 737 (Okla. 1981) (class actions assumed additional importance "when it became apparent that judicial efficiency in meeting present-day litigation explosion demanded that, as far as possible, multiple suits arising from the same facts and involving like questions of law be reduced in number or eliminated").[37]

B. Honoring the Right of Parties to Contract

Defendants are entitled to rely on the binding effect of a negotiated release. *See Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978) ("a litigant can no more repudiate a compromise agreement than he could disown any other binding contractual relationship"); *cf. PMX Indus.*, 31 F.3d at 703 (8th Cir. 1994) (holding that parties are bound to the broad terms of an unambiguous release, regardless of subjective intent). This reliance interest is destroyed if class members are permitted to accept the benefit of a settlement and renege on their promise not to sue. The Ninth Circuit's decision intruded upon the parties' consummated and court-approved agreement, and vitiated an integral part of the bargained-for consideration to be received by Matsushita.

[37] *See Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1167 (7th Cir. 1980) (the preference for settlement "has particular force regarding class action lawsuits"), *aff'd*, 455 U.S. 385 (1982); *In re United States Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits.") (citation omitted); *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 313 (7th Cir. 1980) ("there is an overriding public interest in favor of settlements"); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 338 (E.D. Pa.) (approving mass asbestos settlement), *app. docketed*, 94-1927 (3d Cir. 1994); 2 *Newberg on Class Actions* § 11.41 at 11-85.

This Court has enforced in a variety of contexts the principle that litigants must be bound by the litigation judgments that they make. *See, e.g.*, *McDermott*, 114 S. Ct. at 1471 (adopting proportionate share method of judgment reduction after partial settlement because the plaintiff's recovery had been limited "not by outside forces but by its own agreement to settle"); *Moitie*, 452 U.S. at 401-02 (parties should be held to their "free, calculated, deliberate choice not to appeal") (quotations omitted). The Ninth Circuit's decision defeats the intent of the parties in entering into the Delaware settlement and allows litigants to break their contractual commitments with impunity. *See, e.g., Thompson.*, 992 F.2d at 191 n.5. ("To the extent that the preclusion of 'all claims of any nature whatsoever' is an integral part of the settlement bargain entered into for [defendant] and the class representatives, this Court cannot now modify the terms of that bargain at the insistence of one class member."); *Bear v. Nix*, 977 F.2d 1291, 1295 (8th Cir. 1992); *Ruskay v. Waddell*, 552 F.2d 392, 398 (2d Cir.) ("One who gives a general release has had his opportunity to press his claim . . . . Once the decision to settle is made, a party must abide by it."), *cert. denied*, 434 U.S. 911 (1977).

C. Preserving the Finality of Judgments

The public policy favoring finality of judgments entered on class action settlements is at least as strong as the policy regarding the finality of judgments entered on a trial verdict. As a matter of immediate concern, the Ninth Circuit decision retroactively threatens the finality and repose of any fully consummated state class action settlement that released claims which the court approving the settlement did not have jurisdiction to adjudicate and which are not time-barred. *Cf. McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (noting "the law's interest in finality"); 1B J. Moore, J. Lucas & T. Currier, *Federal Practice*, ¶ 0.405[2], at 189-90 (2d ed. 1984) (underlying policy of preclusion "is the objective of judicial finality").

The Ninth Circuit decision also opens the door to manipulation by class members who, as in this case, can obtain a settlement in state court and thereafter litigate in federal court. This threat is not confined to the securities field; the Ninth Circuit

invites collateral attacks on any case in which the state class releases claims within the exclusive jurisdiction of the federal courts, such as claims arising under the antitrust, patent, and environmental laws. *See* note 36, *supra*.

D. Minimizing Unnecessary Litigation in the Federal Courts

The Ninth Circuit's decision will increase class action litigation in the lower federal courts. Defendants will be uninterested in negotiating incomplete releases in state cases. Class action plaintiffs will, in turn, be required to file any colorable federal claim in federal court so that global disposition of cases may be achieved. Federal courts thus will become the forum for litigation traditionally handled by state courts, even when the core of the parties' dispute centers on such traditional state law claims as breach of directors' fiduciary duties. *See McCarren v. Town of Springfield*, 464 U.S. 942, 944 (1983) ("At a time when judges and observers are increasingly concerned with the work load of the federal courts, the application of principles of res judicata to disputes such as this might both conserve the time of the federal courts and make for a more orderly resolution of this and similar disputes.") (Rehnquist, J., dissenting from denial of certiorari).

* * *

In sum, Matsushita negotiated a consensual settlement of the Delaware action, paid money for a comprehensive release, assumed the risk that shareholders might opt out and continue to prosecute their claims, and participated in a process in which the settlement was subjected to a fairness review by the Chancery Court and the Supreme Court of Delaware. In denying full faith and credit to the judgment entered upon the Delaware settlement, the Ninth Circuit announced a new rule which radically and improvidently redefines the relationship between state and federal courts. As stated in *Sandler Associates*:

> [T]he state court-approved release forecloses this federal action based on principles of comity between state and federal courts. To deny effect to a release of claims merely because it was given in an action commenced in state court would invite unprecedented consequences.

> Such a doctrine would unjustifiably proliferate litigation, defeat legitimate expectations of settling parties, engender uncertainty among class members and defendants as to their ability to retain the benefit of settlements, discourage settlements altogether and create unwarranted conflict between state and federal courts.

818 F. Supp. at 705.

CONCLUSION

For all of the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed. The case should be remanded with instructions to dismiss the complaints with prejudice as to those plaintiffs who failed to opt out of the Delaware settlement.

August 3, 1995

Respectfully submitted,

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QUESTION PRESENTED

Jurisdiction of claims under the Exchange Act is vested exclusively in the district courts. 15 U.S.C. §78aa. SEC rule 14d-10, the so-called "all-holders, best-price rule", promulgated under Sections 14(d)(7)f and 14(e) of the Act, requires shareholder equality "during [a] tender offer." In this class action proceeding, the Ninth Circuit held, *inter alia*, that a tax-driven special stock arrangement between Matsushita and Lew Wasserman, MCA's chairman, violated the rule, and that a jury could so find with respect to a $21,000,000 bonus paid to Sidney Sheinberg, MCA's chief operating officer.

This federal class action proceeding has been vigorously litigated. By contrast, petitioners' counsel represented to the district court that a pending Delaware class action raising only state law claims was "not being prosecuted in any way" after the state court had rejected a settlement as "illusionary", characterized the state law claims as "at best, extremely weak," and had asserted that the federal claims alone had value. No state class had been certified, and no litigation activity occurred for eighteen months in Delaware. After respondents' merits brief had been filed in the Ninth Circuit, petitioners announced another Delaware settlement. In it, the federal claims of non-opt-outs purportedly were released, although Delaware law states that it is ultimately for the federal courts to determine the effect of the release on Exchange Act claims. The Delaware court approved the settlement without making any inquiry into the representatives' class status or the adequacy of their representation. The court found the class benefits to be "meager", and stated that "suspicions abound" of collusion.

Did the court below err in refusing to give preclusive effect to a Delaware settlement and release to the extent that the federal claims were factually and legally unrelated to any state law claims?

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No. 94-1809

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. AND MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

STATUTES INVOLVED

28 U.S.C. §1738 is quoted in petitioners' brief. In relevant part, section 27 of the Exchange Act, 15 U.S.C. §78aa, provides:

> The district courts of the United States . . . shall have *exclusive* jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to *enforce* any liability or duty created by this chapter or the rules and regulations thereunder.[1]

[1] *Emphasis supplied through this brief, unless otherwise indicated.* "Pet. App." refers to the appendix on certiorari; "J.A." to the Joint Appendix. Documents contained in the records of the district court and the court of appeals are designated as "D.R." and "Cir. R.", respectively. References to the Reporter's Transcripts included in the Excerpts of Record

28 U.S.C. §1291 provides that the "courts of appeals . . . shall have jurisdiction of all appeals from all final decisions of the district courts of the United States . . ."

STATEMENT OF THE CASE

A. Introduction.

This petition arises out of Matsushita Electric Industrial Co., Ltd. and its subsidiaries' ("Matsushita") $6.1 billion dollar acquisition of the common stock of MCA, Inc. ("MCA"). A class action complaint was filed pursuant to section 27 of the Exchange Act (J.A. 81), which confers exclusive jurisdiction of Exchange Act claims on the district courts of the United States. 15 U.S.C. §78aa. The complaint alleged that Matsushita's public tender offer violated federal securities laws because it included (a) a special tax-driven stock swap arrangement that was provided to Lew Wasserman, MCA's chairman and chief executive officer, and (b) a $21,000,000 bonus paid to Sidney Sheinberg, MCA's chief operating officer and owner of 1,170,000 shares (J.A. 85-94). These arrangements were alleged to have violated, *inter alia*, SEC rule 14d-10, the so-called "all-holders, best-price" requirement, because "during [a] tender offer" Matsushita provided higher consideration to Wasserman and Sheinberg and "in a tender offer" also offered consideration not open to all stockholders (J.A. 92-93). Rule 14d-10 prohibits premium payments to favored shareholders as part of a tender offer. 17 C.F.R. §240.14d-10.

The district court dismissed the class action complaint ("Epstein") and an individual complaint ("Minton") (Pet. App. 45a-46a, 60a). In major part, the court of appeals reversed. *Epstein v. MCA, Inc.*, 50 F. 3d 644 (9th Cir. 1995); Pet. App. 1a. On the basis of this court's intervening decision in *Central Bank v. First Interstate Bank*, 114 S. Ct. 1439 (1994), the court did affirm dismissal of the Epstein complaint's "aider and abetter" claims against Wasserman and Sheinberg individually. Pet App.

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filed with the United States Court of Appeals for the Ninth Circuit are designated as "RT [date]."

4a n.7. However, the court held that on the undisputed facts the Matsushita/Wasserman transaction violated 14d-10 (Pet. App. 11a-20a), and that a jury could so find with respect to a $21,000,000 "bonus" received by Sheinberg. Pet. App. 20a-23a.

The court ordered, *inter alia*, certification of a federal class. Pet. App. 43a. The court held that a Delaware settlement that purported to release the 14d-10 class claims did not bar the federal class action, at least where, as here, no material overlap (legally or factually) existed between the state and federal claims. Pet. App. 24a-40a. In view of that holding, the court did not reach several additional arguments demonstrating that the Delaware settlement could not be given preclusive effect. On June 19, 1995, this court granted a writ limited to the issue of the preclusive effect of the Delaware settlement proceeding. J.A. 129.

B. Facts.

1. September 1990 to April 1991. The Delaware actions were commenced on September 26, 1990, when the financial press printed rumors that MCA had agreed to negotiate its sale to Matsushita. Pet. App. 24a. The complaints named MCA (a Delaware corporation) and its directors, including Wasserman and Sheinberg. The gist of the complaints was that MCA's board was not discharging duties owed to its shareholders under Delaware law because MCA had sought no other bids. *No Exchange Act claims were alleged in the complaint, nor of course could they have been, given section 27.* No respondent in this proceeding appeared. Pet. App. 24a; J.A. 261.

On November 30, 1990, the full terms of the MCA-Matsushita deal were disclosed through the required SEC filings, MCA's SEC Schedule 14D-9 and Matsushita's Schedule 14D-1 (D.R. 357, Ex. J; D.R. 13, Ex. A). Shortly thereafter, on December 3, 1990, respondent Epstein, who held one thousand MCA shares (D.R. 429, Ex. C), filed a class action complaint in the United States District Court for the Central District of California. D.R. 1. On December 17, 1990, respondents also moved for summary judgment on the basis of rule 14d-10,

asserting (as the court below was subsequently to hold) that this dispositive issue was a straightforward legal one. D.R. 15 at 6-14; D.R. 16. *Epstein's December 3 complaint was the first time that anyone, anywhere, had made formal legal challenge under federal securities law to the tender offer*, and the first time that petitioners had been named as parties anywhere.

At the time the federal complaint was filed, respondents' counsel ascertained from Delaware counsel that no settlement was in prospect. J.A. 298. Once the federal complaint was filed, however, the state litigation moved very quickly towards resolution. At 3:41 A.M. on December 4th, pursuant to prior agreement, Delaware plaintiffs' counsel faxed a lengthy letter to MCA counsel that purported to summarize the basis for injunctive relief against the merger. J.A. 211. *No mention was made of SEC rule 14d-10.* At a hearing in the district court on December 11, defendants announced a non-opt-out settlement "in principle." RT 12/11/90 at 25-26. The new Delaware complaint was not filed until December 14. J.A. 133. The chronology makes it plain that the complaint was written for settlement purposes only and to obtain as much claim preclusion as possible. For example, the complaint alleged a non-existent state law claim charging that the board had caused MCA to violate rule 14d-10. J.A. 140, 151. Petitioner Matsushita voluntarily accepted the Delaware forum.

The settlement proceeding was held in Delaware on January 30, 1991.[2] J.A. 219. Plaintiffs' counsel stated that he had no evidence to prove the claims in the post-settlement complaint. They were not frivolous, but they would not support a preliminary injunction. J.A. 220-21. *Counsel characterized the federal claims* (which the court had no jurisdiction to adjudicate but which, nonetheless, the Delaware plaintiffs intended to release) *as "frivolous", "... distracting to the main litigation, and ... a*

[2] On December 28, 1990, the district court (Real, C.J.) denied respondents' summary judgment without explanation (RT 12/28/90 at 84).

waste of our time and resources ..." (J.A. 220).[3] Under the proposed settlement the class received no monetary compensation. Delaware counsel, however, were to receive fees up to $1,000,000 *paid for by defendants*. The Delaware chancery court noted that this "generous payment, of course, confers no benefit on members of the [c]lass." *In re MCA Inc. Shareholders Litig.*, 598 A.2d 687, 695 (Del. Ch. 1991) (reprinted at J.A. 170). Rejecting the proposed settlement as an "illusionary" one (J.A. 171), *the vice chancellor characterized the state law claims as "at best, extremely weak."* J.A. 167. They had "little or no value." J.A. 170. He added that "the *only* claims which have any substantial merit *are the claims... in the California federal suit that were not asserted in this Delaware action.*" J.A. 171.

2. **April 1991 to September 1992**. With the settlement rejected, there was no Delaware class action because petitioners had agreed to a class only for settlement purposes.

The *Epstein* litigation continued in earnest. Between April 22, 1991 and the district court's February 1992 grant of summary judgment against respondents, it was intensely litigated. There were, for example, *over three hundred docket entries* in the district court. D.R. 100-416. In Delaware, by contrast, *there were no litigation docket entries* between the April 1991 order rejecting the December settlement and the proposed October 1992 settlement. Pet. App. 26a. In December of 1991, *petitioners' counsel represented to the district court that "[t]he Delaware proceeding is not being prosecuted in any way"* because there "*was no basis for the state law claims.*" J.A. 79. After the district court dismissed the complaint on February 10, 1992 (D.R. 416), respondents appealed to the Ninth Circuit. D.R. 507.

[3] Counsel did not explain why the post-settlement Delaware complaint charged these "frivolous" federal law violations. The obvious inference is that counsel recognized that the other state claims they pled did not encompass the facts and law of rule 14d-10.

3. September 1992 to February 1993. Respondents' filed their brief on the merits in the court of appeals on September 25, 1992.

In October, respondents learned that, in a proceeding "not being prosecuted in any way" and in which no class representatives' appointment had been sought or made, Delaware counsel agreed once again to release the federal rights of third parties. J.A. 172. The federal claims were sold at fire sale prices: two million dollars, a payment of about two to three cents per share from which counsel fees were first to be deducted. J.A. 188 (Stipulation of Settlement, dated Oct. 22, 1992).[4] Petitioners understood full well that only the federal claims had significance. J.A. 79. Delaware law permits large shareholders to negotiate control premiums so long as they do not misuse inside information. Implemented by rule 14d-10, federal law prohibits such a premium in a tender offer. Pet. App. 36a-37a n.31; 50 F.3d at 666 n.31. Petitioners' entire interest was in destroying the possibility that a large federal class action might be certified. For a relatively few dollars, they hoped to have purchased a plenary indulgence absolving them from the substantial classwide consequences of their federal law transgressions.

The October settlement was nevertheless approved. *In re MCA, Inc. Shareholder Litig.*, 1993 WL 43024 (Del. Ch. Feb. 16, 1993) (Pet. App. 63a). The vice chancellor repeated his conclusion that the state law claims were worthless. Pet. App. 68a. Of the federal claims, the vice chancellor said only that they had less value now that the district court had rejected them. *Id.* The vice chancellor conducted *no inquiry* – none – into such crucial questions as whether a class existed, whether the plaintiffs

[4] The notice to class members stated that the settlement included "substantial monetary benefits [to] former MCA shareholders." Pet. App. 94a.

were members thereof, *and most important, whether they and their counsel had provided adequate representation. The vice chancellor acknowledged that the class settlement benefits were "meager" (Id.* at 68a, 72a); *and he stated that "suspicions [of collusion] abound." Id.* at 70a. He concluded that "[s]uspicion . . . is not enough and the objectors have offered no evidence of any collusion." *Id.*[5] He awarded counsel fees in an amount substantially less than had been requested. *Id.* at 70a, 72a.

4. The Ninth Circuit. On February 27, 1995, the Ninth Circuit issued its ruling reversing the district court. After holding that there had been an actionable violation of rule 14d-10, the court addressed the Delaware release. Pet. App. 24a. The court assumed that the Delaware *judgment* ordered the release of the federal claims. Pet. App. 31a. The court further assumed, *arguendo* (but with obvious doubt), that a Delaware judgment could release 1934 Act claims if litigating the state claims would necessarily produce issue preclusion with respect to the central elements of the federal ones. Pet. App. 31a, 33a. Relying, however, upon Judge Friendly's opinion in *Super Spuds*,[6] the court held that 28 U.S.C. §1738 did not require preclusive effect, when, as here, the exclusive federal claims did not overlap (in law or in fact) with any of the compromised state causes of action. Pet. App. 34a. *Petitioners, the court observed, "ma[d]e no attempt to argue that any of the [Exchange] Act claims share any*

[5] The subsequent recital of "adequate representation" in the judgment (J.A. 204) which counsel fashioned and on which petitioners rely is not a "finding", inasmuch as no record evidence of any kind was received in the course of the litigation.

[6] *National Super Spuds Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). The court in *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1564 (3d Cir.), *cert. denied*, 115 S.Ct. 480 (1994), made the same distinction, as the Ninth Circuit recognized. Pet. App. 31a-33a.

predicate facts in common with the state law claims that formed the basis of the Delaware class action." Pet. App. 35a.[7] The court's analysis made it unnecessary for it to consider respondents' additional arguments against preclusion grounded in the due process and supremacy clauses.

SUMMARY OF ARGUMENT

Petitioners' argument is not easy to follow. Petitioners never clearly state why the decision below raises a full faith and credit issue, and their various concessions seemingly take that issue entirely out of the case. In the court below, they "expressly disclaim[ed] reliance on claim preclusion." Pet. App. at 34a, n.28. Their brief does not argue that the court below misunderstood their position; or that they are entitled to withdraw their concession; or that they now do argue claim preclusion. In this Court, petitioners reject any analysis grounded on issue preclusion. They fault the opinion below because it "conflates the entirely separate concepts of release and issue preclusion." Pet. Br. at 14. Issue preclusion is irrelevant (Pet. Br. at 22) because, in approving the settlement contract, the Delaware court did not

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[7] On that basis, the court distinguished (Pet. App. 32a-34a) the First Circuit's decision in *Nottingham Partners* and the Third Circuit's in *Grimes*. *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), and *Grimes v. Vitalink Communications Corp.*, *supra*, n.6. As the court noted, these were the only relevant decisions because they alone "implicate the Supremacy Clause, because in each, as here, a state court extinguished exclusively federal claims in settling a state class action." Pet. App. 29a. "In every other case cited by Matsushita, the state court had subject matter jurisdiction to adjudicate all the claims that were released in the class settlement." Pet. App. 30a. In *Nottingham*, it should be noted, the federal plaintiffs had first appeared and litigated vigorously in the state courts the very questions they brought to federal court. 925 F.2d at 30-31, 33. The Third Circuit believed that to be the case in *Grimes*. 17 F.3d at 1562. But see the *amicus* brief by Grimes (pp. 12-14) in this litigation.

"adjudicate" anything. Pet. Br. at 15-16. Petitioners nonetheless insist that the court below disregarded a state court judgment contrary to 28 U.S.C. §1738. Pet. Br. at 25-37. In subsequent litigation, judgments preclude through either claim or issue preclusion. Yet *neither doctrine* is relied upon here. Moreover, petitioners do not argue that a Delaware settlement must be enforced even if the federal claims could not be validly released by contract in Delaware.

Petitioners' avoid conventional analysis under the law of judgments for a reason. From the Delaware decisions petitioners present (Pet. Br. at 25-26), it is clear that the Ninth Circuit (and respondents too) were mistaken in believing that the Delaware *judgment* purported to order the release of the federal claims. Delaware law is otherwise. The release, *not the judgment*, is presented to the federal court; and the Delaware courts state that it is for the federal court to determine the effect and scope of the release. Since the Delaware court's order concerning the federal claims lacks finality, no full faith and credit was denied to the Delaware judgment. The federal court was invited to make its own determination. It did so and properly excluded from the release federal claims that were different in fact and theory from those raised in the state court case. No Delaware judgment was disregarded.

I. Point I demonstrates that the court below correctly considered the exclusive federal claims despite the action taken by the Delaware court. No valid class release could be given as to federal claims having no relation, in fact or law, to the state law claims pled in Delaware. Petitioners seek to avoid this result through a contract analysis. They argue that the class representatives' authority to release Exchange Act claims derives from thousands of individual contracts between the class representatives and class members. The "offer" is the notice of

proposed settlement; the "acceptance" or "consent" occurs when the class member fails to execute an opt-out. Pet. Br. at 21. The law of the state under whose authority they claim the right to contract rejects this claim. In *Prezant v. De Angelis*, 636 A.2d 915, 924 (Del. Supr. 1994), a decision notably absent from petitioners' brief, the Delaware Supreme Court categorically rejected this very consent argument. More fundamentally, the argument misapprehends the nature of class actions. *Class representatives act in a fiduciary manner; they do not make contracts with hundreds or thousands of individual class members*. This Court's cases make plain that class representative's authority to act is derived entirely from a delegation of governmental authority, as *Prezant*, *supra*, 636 A.2d at 923, explicitly acknowledged. If other conditions are also met, a class member's failure to execute an opt-out, when available (compare (b1) and (b2) classes), justifies "presumed consent" to the court's exercising jurisdiction *over the claims asserted in the complaint, not to a bilateral contract with the representative* or the defendant.

Point I also demonstrates that §1738 does not apply here. Delaware law is clear that the release of the federal claims is *not* "incorporated" as an operative, *binding*, part of the state court *judgment*. *Nottingham Partners v. Dana*, 564 A.2d 1089, 1104 (Del. Supr. 1989). To the extent that the release is enforced, it is enforced only as a contract. It is the *release, not the judgment*, that is presented to the federal courts, *ibid.*, and when so presented, the federal court is free to "determin[e] the effect of the release on . . . its own jurisdiction." *Id.* at 1105.

Point I further demonstrates that no Delaware judgment could directly release Exchange Act claims. Section 1738 does not mandate a different result. No decision of this Court holds, or should hold, that a state court judgment can validate, as against absent parties, state court action taken directly in violation of

jurisdictional limitations imposed by an Act of Congress. Finally, Point I addresses petitioners' unfocused "global settlement" policy argument. This Court has repeatedly rejected such arguments when advanced as a basis for ignoring jurisdictional boundaries laid down by Acts of Congress. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 385 (1985); *Finley v. United States*, 490 U.S. 545, 555-56 (1989). And the argument is in any event meritless.

II. Point II demonstrates that no judgment could be enforced even if it had purported to order the release of the federal claims. No full faith and credit can be given to a judgment that violates due process. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982). Lack of adequate representation can be raised by any person when, as here, others seek to bind him by a judgment solely on the basis of representation. *Restatement (Second) of Judgments* §42 (1982). In this case, there was inadequate representation as a matter of law. The vice chancellor held no inquiry under Delaware Chancery rule 23(a). Nothing in the record shows who the state court class representatives are, or that they are members of the class whose claims they purported to release. Moreover, when class counsel announced the proposed settlement, counsel could not litigate the federal claims. Therefore, the entire effort was to disparage them. J.A. 226-39. The vice chancellor, the same vice chancellor reversed in *Prezant*, believed that in a settlement context the only judicial duty was to determine whether or not the settlement made sense from a business point of view. Pet. App. 67a-70a. Adequacy of representation, *vel non*, was irrelevant. Here, as in *Prezant*, he approved the settlement without *any* inquiry into the adequacy of representation despite his own observation that "suspicions [of collusion] abound." Pet. App. 70a. This is an error of a constitutional dimension. Adequacy of representation must exist "at all times," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812

(1985); *Prezant*, 636 A.2d at 923, and the class action court must affirmatively satisfy itself of that fact, if the judgment is to bind. *Shutts*, *supra*, at 812; *Prezant*, *supra*, at 924.

III. Point III demonstrates that even if this Delaware judgment ordered the release of the federal claims, the supremacy clause prohibits its enforcement. This Court's decisions establish that a litigant's right of access to the courts of the United States is derived from the Constitution and Acts of Congress. The Delaware proceedings in this case are not an illustration of a good faith "race to judgment" between state and federal courts that is an inescapable feature of "Our Federalism." No good faith litigation was pending in the state courts. Petitioners' counsel represented to the district court that the state court proceeding was not being "prosecuted in any way" because the state law claims were meritless. J.A. 79. Counsel sought to remove an appeal from the Ninth Circuit to Delaware, a "course of conduct designed to insulate the class certification issue from appellate review." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S 326, 353 n.12 (1980). Enforcing a judgment whose *only* purpose was to interfere with the jurisdiction of the courts of the United States would violate constitutional principles extending back to *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 426 *et seq.* (1819).

ARGUMENT

POINT I. This Delaware Judgment And Settlement Did Not Purport To, And In Any Event Could Not, Oblige The Federal Court To Enforce This Release

A. The Delaware Judgment Is Irrelevant. Petitioners' argument is not easy to follow. The Ninth Circuit had understood petitioners to assert that the Delaware *judgment* itself adjudicated dismissal of the federal claims. Pet. App. 30a-31a. In that court, petitioners had "expressly disclaime[d] any reliance upon claim preclusion" (Pet. App. 34a n.28), and the court found no issue preclusion with respect to non-overlapping claims. Pet. App. 34a. Here, petitioners apparently contend that the law governing the use of judgments to obtain either issue or claim preclusion is irrelevant (Pet. Br. at 14, 22) because no "adjudication" occurred. Pet. Br. at 15, 17.[8] This Court is invited (Pet. Br. at 15-25) to view a class action settlement as no different from an individual settlement. The class representative has simply made an offer to each class member who has accepted by not opting out. Pet. Br. at 21.[9] After using this contract theory to criticize the court below, petitioners invoke the full faith and credit act, 28 U.S.C. §1738.[10] Pet. Br. at 25-37. They -- quite wrongly -- assert that

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[8] To the extent that the argument assumes that an adjudication is necessary for claim preclusion, the argument is obviously wrong. For example, claim preclusion occurs with respect to claims that could have been but were not raised. *Migra v. Warren City School District*, 465 U.S. 75, 83-85 (1984).

[9] The court below rejected petitioners' argument "that regardless of the 'technical *res judicata* effect' of the Delaware judgment, the *Epstein* plaintiffs are barred . . . as a matter of contract." Pet. App. 37a.

[10] The petition for certiorari asserted that the court below ignored the Delaware judgment (Pet. at 1, 2, 7, 10). Question 1 of the petition asked whether "a federal court can withhold full faith and credit from a *state court*

the settlement and release were "incorporated" into the judgment as a binding part thereof and thus was entitled to enforcement as a judgment.[11] Pet. Br. at 26. Judgments generate either issue or claim preclusion. As we have said, petitioners never explain how the law governing enforcement of judgments can assist them, since they reject any analysis grounded in either issue or claim preclusion.

Petitioners' invocation of the Delaware judgment is directly contrary to Delaware law. A Delaware court's authority to accept a class representative's release of Exchange Act claims rests entirely upon *Nottingham Partners v. Dana*, *supra*, 564 A.2d 1089. There, the court clearly states that the state court's judgment can have a direct operative effect *only on the state law claims*:

> "[T]he law has uniformly distinguished between the approval of a general release and dismissal or adjudication of an exclusively federal claim. The former is within a state court's power, the latter is not." 564 A.2d at 1104.

The *release* (not the judgment) would be presented as a defense in the then-pending federal proceeding. "The defendants . . . may file a motion to dismiss in the federal court *based upon the*

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final judgment approving a class action settlement simply because the settlement released *federal* claims." Pet. at i. The question as it appears in their brief inserts the word "exclusively" before "federal claims." Pet. Br. at i. Their brief also contains numerous references to the Delaware judgment. *See, e.g.*, Pet. Br. at 2, 9-13, 18.

[11] Petitioners' incorporation claim is put in stronger language than they used below. There, they asserted that the scope of the release may not be attacked because it "is a term of the Delaware settlement approved by the Court of Chancery and is explicitly *set out* in that Court's Order and Final judgment." Cir. R. 56 at 26.

release." 564 A.2d at 1104. At that point, the state court acknowledged, *it would be for the federal court to "determin[e] the effect of the release on those claims, in the exercise of its own jurisdiction*." *Id.* at 1105. That was also the vice chancellor's view. In rejecting the first Delaware settlement, he recognized that his judgment had no direct effect on the federal claims. "A federal court is, however, free to review and determine the effect and scope of the release on the federal claims." J.A. 163.[12] This result is fully consistent with a general Delaware practice. A settlement has claim preclusive effect only with respect to claims that could have been pled in the complaint.[13]

Under *Dana*, petitioners' "incorporation" claim is insupportable. The release is enforced with respect to the federal claims in accordance with ordinary contract and agency principles. *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S.Ct. 1673, 1675 (1994), is particularly instructive here. There, this Court clearly distinguished between settlements effective as operative parts of the judgment and settlements to end litigation that are enforced simply as ordinary contracts. Here, under Delaware law,

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[12] The judgment in this case was written by counsel. Pet. App. 72a; Cir. R. 57, Ex. G at Ex. D. It states that the federal claims are compromised "with prejudice by virtue of the proceedings herein and of this order and final judgment." J.A. 206, ¶ 3. Whatever counsels' intention, by Delaware law the judgment merely predicts the federal claims' release, unless issue preclusion occurs because a party has actually litigated an issue in the Delaware court. *Cf. Seagoing Uniform v. Texaco*, 705 F. Supp. 918, 924 (S.D.N.Y. 1989) (counsel may not fashion a Delaware judgment broader than court intended, and thereby secure its expanded effect).

[13] See, for example, *Ezzes v. Ackerman*, 234 A.2d 444, 445-46 (Del. Supr. 1967); *Schlaeppi v. Delaware Trust Co.*, 525 A.2d 562, 565 (Del. Ch. 1986); *Maldonado v. Flynn*, 417 A.2d 378, 383 (Del. Ch. 1980). Nor may Delaware fashion a different rule for Exchange Act claims, for to do so would discriminate against federal claimants. *Howlett v. Rose*, 496 U.S. 356, 383 (1990).

judicial approval was a necessary condition to the existence of the settlement agreement. But the settlement contract's binding quality, when it treats Exchange Act claims, *does not flow from the court's order*.

B. Class Members Do Not Make "Contracts" By Not Opting Out. Petitioners stress the differing judicial roles in adjudication and settlement. In a settlement, they insist, no "adjudication" (a term they nowhere define) occurs. Pet. Br. at 15. Settlements, they insist, are governed by the law of contract. Pet. Br. at 13. But any distinction between preclusion by contract and by adjudication can assist petitioners only if the class representatives had authority to make the contract asserted. Where do they get this authority? Petitioners need a second contract argument, which, although obfuscated, runs like this: The contract offer is contained in the "notice of Proposed Settlement" issued by authority of the Delaware court.[14] Contrary to normal contract law, where silence does not constitute acceptance, failure to execute the representatives' unsolicited opt-out constitutes *individual* consent. Pet. Br. at 21. Petitioners do not say whether the consent is to the settlement agreement or to the putative representatives' "agency."

Petitioners' contract edifice is constructed entirely on this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which permits nationwide state court damage class actions: "If, as *Shutts* holds, a class member's decision not to opt out constitutes 'consent' to the jurisdiction of the state court, *surely a failure to opt-out of a state court class action settlement likewise constitutes effective consent to the settlement*." Pet. Br. at 21. Petitioners argue that the Ninth Circuit's sharp distinction between

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[14] It should be noted that, as this is a settlement class, when the offer supposedly occurs, no "offeror" has yet been finally appointed as anyone's "representative." *See Prezant v. De Angelis*, 636 A.2d 915, 923 (1994).

individual and class action settlement "simply cannot be reconciled with *Shutts*." *Id.*[15]

Petitioners' argument is deeply misconceived. **First.** The law of the state under whose authority they claim the right to contract rejects their claim. In *Prezant v. De Angelis*, 636 A.2d 915 (Del. Supr. 1994), *the Delaware Supreme Court rejected the very argument petitioners advance*. There, the same vice chancellor as in this case certified a class for settlement only and approved the settlement, but made no finding of adequate representation. He believed the issue to be irrelevant, so long as he was satisfied that the settlement was fair. Those defending the settlement argued for affirmance because, as here, the terms of the settlement were known and a right of opt-out existed. The Delaware Supreme Court rejected the argument. Pointing out that opt-out rights are "infrequently utilized and usually economically impracticable", *id.* at 924, *the court made clear that a class*

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[15] Petitioners now rely entirely on the theory that absent class members make contracts. They distance themselves from what they urged below and on *certiorari*. There, petitioners argued that the state court could accept the release of claims if they concerned the "same transaction." Cir. R. 56 at 13; Pet. at 6. The Ninth Circuit rejected this. Pet. App. 35a-37a. Petitioners apparently now recognize that a "transaction" test simply refocuses attention on the meaning of that term. The state court could not define "transaction" to include directly provisions of the Exchange Act. Moreover, the scope of "transaction" must be approached with restraint in the class action context. *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 157-58 (1982). If the issue had been raised there, Delaware would not *define "transaction" to include cases in which no material overlap in fact or law exists between the state and federal claims*. Delaware law of federal claim release requires the existence of the "same operative facts." In *Nottingham Partners v. Dana*, *supra*, 564 A.2d at 1105-06 (Del. Supr. 1989), and in *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982), on which *Nottingham* relied, that standard required that the disputed material element of the settled claim, whether state or federal, was effectively identical to the claim before the court.

member's knowledge of the settlement and his or her failure to opt-out were not the equivalent of consent to anything, especially to inadequate representation. *Id.* at 924. Indeed, the court explicitly rejected the authorities on which petitioners rely. *Id.* at 924 n.6.

Quite plainly, petitioners' theory of the nature of class actions has been jerry-rigged for this case alone. The theory takes no account of the fact that in Delaware most shareholder settlements are certified (as was the first one here (Cir. R. 57, Ex. D)) as rule 23 (b)(2) classes, where no right of opt out exists. No contract theory would remotely explain why these settlements have binding effect. Moreover, petitioners' individual contract argument has no support in ordinary Delaware law governing individual contracts.[16]

Second. Petitioners' argument contains an even more fundamental defect. Class actions are "nontraditional forms of litigation." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 402 (1980). Class actions are assertions of governmental power -- an assertion that depends upon a complex array of judicial findings, including the determination that the representative will adequately represent the class. The representative's authority to bind members comes from the delegation of governmental power, not from contract, as the Ninth Circuit recognized. Pet. App. 37a-40a. "'[C]lass actions involve the delegation of authority [by the state] to pursue a common goal'." *Prezant v. De Angelis*, *supra*, 636 A.2d at 923 (citation omitted). *The class representative is a fiduciary*, not a court appointed "offeror" who enters contracts with hundreds or

[16] To view the obscure notice of settlement as a contract "offer" strains credulity; to view the failure to execute an opt-out as an assent is unprecedented.

thousands of individual members on matters beyond the subject matter jurisdiction of the court.

Shutts supports the decision below, not petitioners' argument. *Shutts* concerned state court *in personam* jurisdiction over absent class plaintiffs. The presumed consent to jurisdiction found in *Shutts* has *no* contractual character as between the representative and the individual class members. The *"consent" is to the authority of the court* over the claims asserted in the complaint.[17] It is a dramatic extension of *Shutts* to argue, as do petitioners (Pet. Br. at 21) that any imputed consent extends to giving the (not yet appointed) class representatives boundless authority to contract away any and all rights of the plaintiff class in any manner related to the transaction, to say nothing of claims within the exclusive jurisdiction of the federal courts. If petitioners' contract theory of *Shutts* were correct, and notice of settlement and right to opt out were all that were necessary, most of rule 23 and its Delaware analogue would be superfluous. But petitioners are not correct. *The fundamental point is that the representatives derive all their authority from the court's*

[17] *Shutts* acknowledged the potential dangers that might lay ahead by virtue of its holding that state court exercise of jurisdiction was reasonable. 472 U.S. at 816-23. It postponed, for example, the question whether a person who did not opt out could be held responsible for costs, or be subject to discovery obligations. *Id.* at 810 n.2. *See* Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 22 (1986).

Shutts also stressed out the importance of notice. In sharp contrast to the practice in this case, letters were sent first class mail, and those that could not be delivered resulted in exclusion from the class. 472 U.S. at 812-13. Here letters were sent to owners of *record*, but *they* (*i.e.*, brokers) were asked to forward the notice to all beneficial owners. As a practical matter, recipients' failure to receive *effective* notice is demonstrated by the fact that *only* 18 chose to opt out. Pet. App. 66a. Compare *Shutts*, where 3,400 opted out. 472 U.S. at 813.

appointment, not from their bilateral relations with class members. A class action is not like an individual action; it is analogous to a "quasi-administrative proceeding, conducted by a judge." *Shutts*, 472 U.S. at 809 (citations omitted); *Prezant v. De Angelis*, 636 A.2d at 922 ("unique character of class actions"). In such a proceeding a class representative is, above all else, *a fiduciary*, not a contract broker negotiating individual contracts with hundreds or thousands of absent class members.

Petitioners' contract argument vests the representatives with a free-standing authority apart from the claims in the complaint. Rule 23(a) (and its Delaware counterpart) shows that this is false. There must be commonality of claims, the representatives' claim must be typical and the representatives must fairly and adequately protect the class interests.[18] As *Prezant* recognizes, these requirements are not matters of contract, and their determination must be made against the allegations of the complaint upon which representative authority is sought. 636 A.2d at 923-24. Unlike individuals and corporations, who do not derive their contractual capacity from the courts, a representative's authority, and in rule 23(b)(3) cases the class' existence as a contracting party, comes from the court. We must, accordingly, look to the class complaint to mark the outer boundaries of authority. In *Local No. 93, Int'l. Assn. of Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986),[19] although noting the contractual aspects of consent decrees, this Court held that "a consent decree must spring from and serve to resolve a dispute

[18] *Shutts, supra*, 472 U.S. at 809-810; *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156-157, 160-61 (1982); *Nottingham Partners v. Dana*, 564 A.2d at 1094.

[19] "The question is not whether we can label a consent decree as a 'contract' or a 'judgment', for we can do both." *Firefighters, supra*, 478 U.S. at 519.

within the court's subject-matter jurisdiction." And, of course, the court's jurisdiction circumscribes what may appropriately be the subject matter of that complaint.

Distinct Exchange Act claims are not part of the state court complaint. As the vice chancellor said, those claims "were not asserted in this Delaware action." J.A. 171. Petitioners' effort to transcend that limitation by pointing to defendants' "contracts" between the class representatives and the class member has startling consequences. If presumed class consent is not bounded by the complaint, the state court representative should also be able to barter away every right of MCA shareholders, however far removed from the complaint, by sending shareholders a notice of an intention to do so with court approval.[20] Here, for example, the release is drafted so that it "settles" whatever malpractice claims absent class members might have had against Delaware counsel.[21] Pet. App. 93a-94a. Pursuing this logic to its end, Delaware counsel could organize "contract" settlements of federal claims without regard to whether there was any state law litigation in existence. In effect, that happened here. Petitioners revived an abandoned and by counsel's admission non-meritorious state law claim in a moribund state litigation to destroy an intensely litigated federal claim.

Shutts, of course, states the minimum constitutional requirement with respect to state court damage class actions if absent class members are to be bound. Wholly apart from the 14th amendment, however, Congress can impose additional limitations

[20] For example, representatives in a Truth In Lending Act class action protesting inadequate warranty disclosures in car leases could release "any and all claims" arising out of the leases, including all future product liability claims.

[21] Petitioners' argument means that this contract too must be enforced under §1738.

upon the jurisdictional competence of the state court with respect to the enforcement of federal rights. That Congressional authority has been exercised since the First Judiciary Act.[22] *Section 27 is such a limit*. As such, it necessarily limits the authority of any "representatives" with respect to claims under the Exchange Act. *The Delaware representatives are not -- and whatever the intention of the state courts, cannot be made to be -- class representatives insofar as former MCA shareholders' claims under the Exchange Act are concerned*. By virtue of section 27, the Delaware class action is necessarily a *limited* or partial one.[23]

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[22] See P. Bator, *et al.*, Hart & Wechsler's *The Federal Courts and the Federal System* (3rd ed. 1988) at 479 ("Hart & Wechsler").

[23] Limited or partial classes are a common place. Fed. R. Civ. Proc. 23(d); *Manual for Complex Litigation* (Third) §30.46 (1995). This analysis recognizes that a state court might incidentally affect the federal claim because of the issue preclusive effects of its findings on matters admittedly within its jurisdictional competence. *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388 (1929), is a good example. The state court ruled that the defendant patent holder had appropriated his invention from the plaintiff. This finding established the patent's invalidity if the patent holder subsequently sued in federal court to enforce it. This Court distinguished between "establishing a fact" which was within the power of a state court in a prior proceeding, and "giving a specific effect to [that fact]", which was a power reserved to the federal court by virtue of the grant to it of exclusive jurisdiction. *Id.* at 391. Relying on *Becher*, Judge Hand made a similar distinction in the antitrust context, but he strongly suggested that exclusive jurisdiction grants required the federal court itself to redetermine any broader state court conclusion. *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955). Petitioners, we note, make no effort to extend these conventional cases by arguing that the state representatives should be able to release what their litigation would necessarily bar through issue preclusion. This is because the argument could not help them given the Ninth Circuit's no overlap holding. Moreover, here the destruction of the federal claim was not "incidental" to otherwise valid state proceedings, but the entire purpose of those proceedings. Until *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), the cases and debate focused on whether *federal* preclusion law should give effect to state court determinations on matters other than fact. See, *e.g.*, Comment, 8 Stan. L. Rev. 439 (1956); Note, 69 Yale L.J. 606 (1960); Note, 46 NYU L. Rev. 936 (1971).

Seemingly, petitioners concede this point. They do not and cannot assert that "acting pursuant to Delaware class action law" (Pet. Br. at 21), or general state contract law, the representatives could be authorized by the court or their class members to *litigate* an Exchange Act claim. Petitioners never explain why, in these circumstances, a state court can grant class representatives authority to release Exchange Act claims that are beyond the court's subject matter jurisdiction. Differences between adjudication and settlements have absolutely no explanatory power.[24] "The logical question", wrote Judge Easterbrook, "is whether the person making a contractual undertaking to settle a case has authority to enter the contract . . . if he does not, it does not gain any additional force by being filed with a court." Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U of Chi. Legal Forum 19, 35 (1987). Judge Easterbrook added, "[u]ltimately there is no good reason to allow consent decrees to make binding promises that exceed the authority parties would have in the absence of litigation." *Id.* at 39.

If there is *no* material overlap between a release and what is alleged in the class complaint -- and the court below said this is true (Pet. App. 34a, 35a) without challenge by petitioners (pp. 7-8,

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[24] Suppose, for example, that, as is the usual practice, the class representative was appointed *prior* to settlement. Would the class notice be a valid exercise of state power if it said that the representative's authority includes the right to litigate federal claims in the state court? To compromise them? Does it toll the federal statute of limitations? The state court could not confer such authority. That judicial approval of such a representative's conduct was granted *ex post* in a class certified for settlement only does not change the underlying legal issue.

supra)[25] -- how could that release fall within any conceivable conception of a class representative's authority? Both the due process clause and the basic structure of our federal union of states circumscribe any possible assertion of state authority here. See *Shutts*, *supra*, 472 U.S. at 818-19 (state cannot apply its own substantive law unless it has sufficient contact with person or transaction). Equally compelling, here there is an Act of Congress. By virtue of § 27, Exchange Act suits are not within the subject matter jurisdiction of the state court.

Given the large percentage of settlements in all litigation, including securities litigation, petitioners' "contract" analysis effectively eviscerates § 27's direction that Exchange Act litigation is not to proceed in the state courts.[26] Yet, they insist that this

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[25] The same is true in their petition for *certiorari*. In their opening brief, however, petitioners seek to withdraw from their no-overlap concessions by objecting that the Ninth Circuit's test is "unadministratable." Pet. Br. at 43-45. This move is unavailing here. Whether issue preclusion has resulted from a prior suit is a familiar issue for courts. *Restatement (Second) of Judgments* § 27 (1982). Moreover, presumably this court did not grant certiorari to review the determination that there was no overlap. And, in fact, there would be no issue preclusion under traditional principles, given the issues before the Delaware court, a fact that petitioners seek to obscure. See p. 17, n.15, *supra*. Finally, whether a Delaware *settlement* (rather than an adjudication) could work issue (rather than claim) preclusion against third persons solely on the basis of representation raises issues of due process not briefed here, and beyond the scope of the writ in this case.

[26] Petitioners' argument (Pet. Br. at 19-21) that the exclusive jurisdiction is riddled with exceptions is wrong in fact (and irrelevant were it true). 1934 Act claims may be arbitrated, but that is pursuant to another Act of Congress and the arbitration rules are SEC supervised and the awards are federally enforced. *Shearson v. McMahon*, 482 U.S. 220 (1987). Of course, individuals and corporations can settle such disputes; they can also make contracts without coming to court. The states can adjudicate 1934 Act claims if they provide a federal defense to state-created liability; the states may not, however, adjudicate them as counterclaims. *Western Capital Securities v. Knudsvig*, 768 P.2d 989, 992-93 (Utah App. 1989). The issue

does not matter because § 27 is concerned only with (their undefined term) "adjudication" (Pet. Br. at 15, 21), not "contracts." This distinction finds no place in the language of § 27, which denies state jurisdiction over suits "*to enforce* any liability or duty" created by the act and its regulations.[27] Petitioners' "settlement" surely falls within that language. The state law claims were both meritless and abandoned. All that was being "enforced" in the state court is the Delaware representatives' (two cents-a-share) valuation of the federal claims asserted in the *Epstein* litigation. This is the exercise of power conferred exclusively on the federal courts under § 27 (p. 47, *infra*).

C. The Irrelevance of Section 1738 To This Litigation. After having stressed the limited *judicial* role in "contract" settlement, petitioners invoke (Pet. Br. at 25-37) "the full faith and credit" statute, 28 U.S.C. §1738. Petitioners make no claim that the *judgment* extinguishes the 14d-10 claims other than by incorporating the settlement. Under *Nottingham Partners v. Dana*, *supra*, and the vice chancellor's first opinion in this case, no "incorporation" can reach the release of federal claims, because

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preclusive effects of state court *findings* rests on the fact that the matter has been subject to full *judicial* determination, not a one-judge-business-judgment review. And there is nothing anomalous in the state courts' different authority over 1933 and 1934 Act claims. Congress made that choice. Even if originally enacted without discussion, Congress' current concern to enact legislation creating a fair balance in federal litigation of 10b-5 claims shows that the exclusive jurisdiction is still desired.

[27] After *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824), it "would be universally conceded that a further constitutional function of federal courts is to enforce federal law -- to establish the facts determinative of the application of federal law even if the law's content and applicability are undisputed, and to enter and enforce the appropriate judgment." Hart and Wechsler, *supra*, at 984.

that was for the federal court to determine "in the exercise of its own jurisdiction." 564 A.2d at 1105. Since the Delaware order concerning the federal claims lacks finality, no full faith and credit was denied to the Delaware judgment. Moreover, petitioners nowhere explain how their "incorporation" theory could transcend the limits of *both* state (*Dana*) and federal (§ 27) law.

There is another reason why §1738 is irrelevant. *Petitioners have never argued that §1738 protects a Delaware judgment if, because of section 27, the Delaware courts lack authority to authorize class representatives to release the federal claim.*

D. Section 1738. The question presented in the petition asserts (incorrectly, as we have shown) that the state court judgment directly released the federal rights. Even if that were true, §1738 would not require that preclusive effect be given to the judgment.

1. Delaware. When petitioners present a Delaware judgment as a defense in a federal proceeding, they must, as a threshold matter, show that the Delaware courts would invoke it to bar this action in Delaware. Petitioners make no such showing. The vice chancellor's intent to authorize the representatives to release the 14d-10 federal claims does not immunize the judgment from collateral attack. Petitioners concede that *no one* challenged the vice chancellor's subject matter jurisdiction. Pet. Br. at 8. Delaware courts would permit respondents to raise the jurisdictional objection that *Dana's* analysis does not apply to completely distinct claims, and could not constitutionally do so.[28]

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[28] *Division of Child Support Enforcement v. Myrks*, 606 A.2d 748 (Del. Supr. 1992); *Brooks v. Taylor*, 154 A.2d 386 (Del. Supr. 1959); *Epstein v. Chatham Park, Inc.*, 153 A.2d 180 (Del. Supr. 1959) (original court must have jurisdiction).

Moreover, even if the Delaware courts might enforce the contract, the Delaware Supreme Court in *Dana* did not believe that the federal courts were under a similar compulsion. 564 A.2d at 1105.

2. Section 27. This Court has never authoritatively resolved the relationship between §1738 and Congressional statutes conferring exclusive jurisdiction upon the courts of the United States. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), the *only* decision on point, makes that clear. There, the court of appeals had applied a federal common law rule of preclusion that was *broader* than that contained in most states' laws. This Court directed the court to determine, so far as possible, the content of state preclusion law, 470 U.S. at 380-83, stating that this disposition made unnecessary resolution of "the more general question . . . whether the concerns underlying a particular grant of jurisdiction justify a finding of an *implied partial repeal* of §1738."[29] *Id.* at 386. *Marrese* framed the inquiry in terms of "implied partial repeal" -- in order to effectuate "the intent of Congress."[30] Prior to 1982, however, there was no understanding that §1738 was applicable, *when the subject matter*

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[29] *Marrese* "leaves unexplored the difficult question whether and when state preclusion rules can be defeated by the policies that led Congress to make federal jurisdiction over a certain class of claims exclusive." Hart and Wechsler, *supra*, at 1628.

[30] *In so doing, Marrese* endorsed a rationale that, in fact, *Kremer* had asserted without analysis in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982). Moreover, *Kremer* itself came but a year after this Court had said that §1738 did not apply if the state court "did not have jurisdiction over the subject matter or the relevant parties." *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accidental Health Ins. Gty. Ass'n.*, 455 U.S. 691, 704-705 (1982) ("*Underwriters*").

limitation on the state court was the result of an act of Congress.[31] The applicable rules of preclusion were drawn from federal common law. *See University of Tennessee v. Elliott*, 478 U.S. 788, 794 (1986) (court has "fashioned federal common law rules of preclusion in absence of a governing statute").[32]

If "the intent of "Congress" is crucial, Congress, in enacting §1738, could not have intended an assault on its own statutes that excluded the states from exercising jurisdiction.[33] No

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[31] That premise reflected the legal landscapes against which both §1738 (1790) and the Exchange Act (1934) were enacted. "The [1790] Act extended the rule of the Constitution to all courts, Federal as well as State." *Davis v. Davis*, 305 U.S. 32, 40 (1938). When §1738 was enacted, exclusive jurisdiction provisions were *already* in existence. Their purpose was not simply to confer jurisdiction, but to keep the state courts out. Exclusive jurisdiction means, in the language of the First Judiciary Act, "jurisdiction exclusive of the state courts." It is awkward to see these provisions as now subject to an "implied partial repeal" analyses, because those who enacted them "knew" that §1738 did not affect them. For this Court's practice, see *Lessee of Hickey v. Stewart*, 44 U.S. 750, 762 (1845); *Oliver v. Rumford Chemical Works*, 109 U.S. 75 (1883) (*dictum*, disregarding state decree). We know of no early federal case that suggested that §1738 limits federal power over claims within exclusive federal jurisdiction. The absense of such decisions strongly reinforces the position that §1738 has no applicability in these circumstances.

[32] Until *Allen v. McCurry*, 449 U.S. 90 (1980), focused attention on §1738, the courts thought in terms of "general" rules of preclusion in exclusive jurisdiction cases. And a significant consensus emerged. And, it should be noted, this consensus emerged unsympathetic to the federal plaintiff who had lost in the state court and recast the same factual allegations as federal claims. Many courts and commentators objected to this "two bites at the apple approach." Still, the courts assumed that the issue was a matter of federal common law. *E.g.*, *Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 762 (2d Cir. 1968).

[33] The Court need not hold that § 27 impliedly repeals §1738. There is no language of §1738 that the court must disavow to permit this suit to go forward. Rather, here as in *United States v. Fausto*, 484 U.S. 439 (1988),

decision of this Court suggests, even in *dicta*, that a state court judgment can validate, as against absent parties sought to be bound only on the basis of representation, state court actions that directly violate Congressionally imposed subject matter limitations.[34] If

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the issue is the extent to which one federal statute, §1738, must be read in light of, and may be altered by, the implications of a later-enacted federal statute so as to get them "to 'make sense' in combination." *Id.* at 453. This is the approach that this Court followed in *Shearson v. McMahon*, 482 U.S. 220 (1987), where it held that § 27 did not displace another federal statute with respect to arbitration of individual claims.

[34] *Marrese* held that a federal court may not give preclusive effect to a state court judgment under §1738 without *first* determining whether state law would require such preclusion. The decision had strong federalism overtones. The plurality in the court below had held that as a matter of federal common law (not §1738) the prior state proceeding had precluded a subsequent federal antitrust suit. Three state attorneys general argued against broad preclusion rules because local lawyers unfamiliar with federal law would harm their clients. Thus *Marrese* protected states against federal imposition of expansive preclusion rules. The case does not hold that a federal court *must* give preclusive effect under §1738 to a state court judgment that violates the explicit limitations on state court jurisdiction prescribed by federal statute. As the court said, "[u]nless application of Illinois preclusion law suggests, contrary to the usual view, that petitioners' federal antitrust claim is somehow barred, there will be no need to decide in this case if there is an exception to §1738." *Marrese*, 470 U.S. at 383. However broad or narrow those exceptions may be, one thing must be clear; it would defeat the purpose of exclusive jurisdiction if a state court could simply violate § 27 and then use §1738 to defeat the right of the federal court to hear the case at all -- in effect, requiring the federal court to enforce the state court's violation of federal law.

Kremer is even more removed from this case because the Congressional legislation plainly contemplated an affirmative role for state enforcement mechanisms. In *Kremer*, the court held that under §1738 a state court employment discrimination proceeding could preclude a federal Title VII claim, because neither "the language [n]or operation" of Title VII disclosed a "manifest incompatibility between Title VII and §1738." 456 U.S. at 470. Title VII, however, clearly contemplated some role for state proceedings in the administration of the federal remedy. Title VII affirmatively required plaintiffs to exhaust state administrative remedies by

§1738 is given any direct role in such cases, no formulation of the applicable rule should impel this Court to frame the central issue in all or nothing terms -- § 27 is, *e.g.*, either entirely outside §1738, or it is not.

Petitioners denigrate § 27 as a Congressional mistake, implicitly inviting the court to view "implied partial repeal" as an all-or-nothing proposition (Pet. Br. at 32-33). In considering § 27's impact on §1738, it is important to bear in mind that federal and state securities laws often contain important substantive differences, as this case illustrates. When federal law imposes duties that have no state law counterpart, indeed when, as here, federal law is designed to *reject* state law (*Polaroid Corp. v. Disney*, 862 F.2d 987, 992 (3d Cir. 1988), there is no reason whatsoever to allow states by adjudication or by contract to undercut the federal mandate. Moreover, even when an overlap exists between state and federal law, as is typically the case in 10b-5 cases, the extent of the overlap is easily exaggerated.[35] In

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filing charges with the appropriate state agency (if one existed) before commencing federal proceedings. 42 U.S.C. §2000e-5(c). The statute said nothing to indicate that the States were forbidden from providing judicial review for such state-agency proceedings, as was typical of administrative procedure. In those circumstances, it can scarcely be thought that a "manifest incompatibility" existed between Title VII and an interpretation of §1738 that gave preclusive effect to judicially reviewed administrative findings. In contrast, where a statute, like the Exchange Act, explicitly ousts state courts from any jurisdiction over a class of claims -- that is, where Congress has created a right to a federal forum -- it is equally difficult to maintain that there is no "manifest incompatibility" between the "operation" of § 27 and a construction of §1738 that effectively makes binding upon federal courts a state court's violation of § 27's exclusivity requirement.

[35] 10b-5 claims differ significantly from state fraud claims in many respects. For example, no state analog exists to the presumption of market reliance recognized by this court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

addition, both *Kremer and Marrese* involved state court adjudications. For purposes of §1738, it is not evident that their principle applies to settlements, especially to classes certified *only* for settlement purposes. In a settlement a judge applies only a "business judgment" standard (Pet. Br. at 35 n.35); adjudication, however, brings focused judicial attention on explicit facts or legal issues, and a right to appeal within the state that further sharpens the issues. There is, accordingly, less danger that federal law interests will be overlooked. Petitioners' argument that "no federal interest is implicated when a state court approves a release of a federal claims" (Pet. Br. at 35 n.29) gets matters backwards. Finally, different state and federal remedial frameworks may exist. For example, in Delaware, no class action for damages can be maintained for fraud. *Prezant v. De Angelis*, *supra*, 636 A.2d at 920. This means that class counsel must frame their claims as equitable ones, and cannot get the benefits of a jury trial.

E. § 27 Is Fully Applicable to Settlements. Laid bare, petitioners invite this Court to ignore settled limitations on state court competence by invoking some supposed policy favoring "global" settlements (Pet. Br. at 46-47, 49). Petitioners never identify the source of their "global" settlement policy (state or federal law) or its content. They never explain why when state and federal claims do not overlap there is any *improper* inhibition of any state court settlement process. They never mention the existence of the legislation that, at this writing, has passed both Houses of Congress and that is directed to abuses in class action securities settlements. The proposed legislative revision of class action procedures for 1934 Act cases is certainly not premised on the belief that the same class action abuses can continue by "releasing" 10b-5 claims in state court.[36] Congress wants reform,

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[36] The proposed federal legislation presumptively gives control of the class action to larger shareholders. The legislation would prohibit just the

not abolition of Exchange Act class actions. More fundamentally, petitioners ignore that a similar "efficiency", "one-law suit" argument was directly rejected by this Court in *Marrese* as a justification for disregarding rules imposed by Acts of Congress defining the appropriate allocation of functions between state and federal courts. 470 U.S. at 385. *See also Finley v. United States*, 490 U.S. 545, 555-56 (1989). Efficient or not, Congressionally imposed jurisdictional limitations must be respected. If Congress wishes to alter the jurisdictional limit it can act, as it did after *Finley*. See 28 U.S.C. 1367.[37]

Petitioners' claims, if sustained, are bound to generate unseemly judge -- or, more accurately, lawyer -- shopping by defendants seeking the cheapest settler. *Prezant v. De Angelis*, *supra*, 636 A.2d at 919. They portend other difficulties as well. Delaware shareholder settlements are generally fashioned on a non-opt basis. If the presence of damages claims does *not* constitutionally compel the opportunity to opt-out, an issue left open by this Court in *Ticor Title Ins. Co. v. Brown*, 114 S.Ct. 1359 (1994), then as a practical matter the Delaware court (and any other state court) will be able to control the operation and effect of the securities laws by the technique of settlement. The exclusive jurisdiction conferred by Congress on the federal courts

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kind of false assertions of "substantial benefits" that the settlement notice in this case made. The legislation requires that the class be given detailed information before any settlement. To permit state plaintiffs who do not meet federal standards to settle 1934 Act claims will eviscerate the legislation's protective function. H.R. 1058, 104th Congress, 1st Session (1995); S.240, 104th Congress, 1st Session (1995).

[37] Petitioners implicitly argue that there must be only one court if there is to be a global settlement. This is wrong. Partial settlements are a common place in class actions. *Manual for Complex Litigation (Third)* §30.46 (1995). Moreover, it is far from uncommon for "settlers" to present a complaint settlement for the approval of both a federal court and an administrative agency, and for a state and federal court.

will instead be transferred to the state courts. This, in turn, would restrict this Court's appellate jurisdiction because only a contract is involved.

Finally, petitioners make absolutely no mention of the dangers to the enforcement of the securities law created by the newly claimed authority of the Delaware courts. Professor Coffee describes this as "the most interesting recent development in securities litigation."[38] "[W]eak derivative and class action claims that once would have been routinely dismissed by the Delaware Chancery Court now have an enhanced settlement value, . . . because they can release federal claims." J.A. 276. In language especially apt here, he notes that "ironically the incentives for defendants are . . . never [to] seek dismissal on the merits of a state class action if a companion federal class action raising related federal claims is possible, but instead reach a settlement in which the defendants are given a general release."[39] J.A. 276. Those dangers are greatly intensified when, as here, the class has been certified for settlement purposes only.

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[38] John C. Coffee, Jr., *Suspect Settlements in Securities Litigation*, N.Y.L.J., March 28, 1991, at 5 col. 1 (J.A. 275).

[39] *See also, e.g.*, Anthony Borden, *The Shareholder Suit Charade: The Wilmington Filers Shake Down Corporations in Delaware, and No One Seems To Mind*, Am. Lawyer at 67 (Dec. 1989); *Coupon Clipping For Lawyers*, editorial, Wall Street Journal, November 18, 1993, A20, col. 1; *Millions for Us, Pennies for You*, N.Y. Times, Dec. 19, 1993, Section 3, p. 1. The subheading read, "Suits on behalf of investors enrich lawyers. But what of their clients?"

POINT II. This Delaware Settlement Release Proceeding Violated Due Process.

For the reasons discussed in Points I and III, respondents believe that they were not required to expose their federal class action claims, already on appeal, to a state court settlement proceeding. Even if they are wrong on these points, no court could enforce *this* release against absent class members (even had its terms been judicially ordered) because the result would violate due process. "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982).[40] Adequacy of representation is, of course, open to challenge by any litigant who did not make a personal appearance and who is sought to be bound by representation alone. "[A]fter judgment has been entered and subsequently is invoked against the class, the adequacy of representation is open to examination . . . [and] doubts over the adequacy of representation are more readily resolved in the direction of withholding *res judicata* effects of the judgment." F. James, G. Hazard, and J. Leubsdorf, *Civil Procedure* 631 (1992) ("James and Hazard") (citing Restatement (Second) of Judgments §42, comments e and f). This is familiar law.[41]

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[40] The full faith and credit requirement "is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law." *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 15 (1907).

[41] *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940), made plain that the constitutional sufficiency of adequate representation is open to collateral attack by absent class members. The court cited §1738, *id.* at 40, but found it no bar. Class actions are no exception to the rule "that the court conducting the action cannot predetermine the *res judicata* effect of the judgment . . . [and] due process of law would be violated for the class judgment unless the court applying *res judicata* could conclude that the class

Compliance with due process is a necessary part of any full faith and credit inquiry, and while the court below did not rest its decision on due process grounds, they were strongly argued and they fully support the judgment. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 279 (1976). In significant respects, moreover, they provide an alternative formulation of the holding below.[42] Additionally, they raise important issues in the administration of class actions. Few contemporary issues are as troublesome as the marriage of class action and settlement releases. The issues are especially worrisome when, as here, a class is certified only for settlement purposes. *See Prezant v. De Angelis*, *supra*, 636 A.2d at 921-25, and *In re General Motors Pick-Up Truck Fuel Tanks Prod. Liab. Litig.*, 55 F. 3d 768, 794 (3rd Cir. 1995) ("General Motors").

In state class actions organized under analogues to rule 23(b)(3) the state court has no *in personam* jurisdiction to bind absent class members unless the due process criteria *Shutts* sets out are met. This settlement proceeding fell far short of those requirements. No class action release can bind absent class members unless a judicial inquiry determines, on the record, that a class exists and that it has or will be adequately represented by

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was adequately represented in the first suit." 3 Newberg and Conte, *Newberg on Class Actions*, §16.25 at pp. 16-133-137 (3d ed. 1992) (collecting authorities from virtually every circuit). Petitioners' unexplained invocation of the "Rooker-Feldman" doctrine (Pet. Br. at 35 n.29) is meritless. See *Homola v. McNamara*, 59 F.3d 647, 649 (7th Cir. 1995) (Easterbrook, J.)

[42] A state representative has no bargaining leverage with respect to claims he or she cannot litigate, even in the guise of asserting partly parallel state claims. Such a representative is necessarily an inadequate representative. That due process objection captures the Ninth Circuit's concern that the material elements of the 14d-10 claim were totally different from those that Delaware counsel could litigate. Pet. App. 35a-37a.

named plaintiffs and their counsel. No such inquiry was held.[43] Moreover, this record as it now stands discloses *as a matter of law* both inadequate class representation and inadequate judicial supervision of the settlement proceeding.

A. Inadequate Representation. The relevant principles governing adequacy of representation are familiar ones, and we will not burden the court with endless citations to the extensive authorities.[44] Suffice it to say that the class representative must have a commonality of interest with the class, have no disabling conflict of interests, and fairly and vigorously represent the class members. *Shutts*, *supra*, 472 U.S. at 808-810; *Restatement (Second) of Judgments* §42 (d) and (e). We turn now to the relevant facts.

1. Class Representatives. *Who are the class representatives*? Nothing in the record shows that the class representatives were members of the state court class, or if so, that they were among the smaller group that held the Exchange Act claims they tried to release.[45] In fact, not even the plaintiffs'

[43] "[We] do not believe that a class action settlement can constitutionally bind absent class members without a judicial determination [of] . . . adequate representation. *Prezant*, *supra*, 636 A.2d at 924.

[44] For a collection of the cases, see, for example, 5 Newberg and Conte, *supra*, at §§22.26 *et seq.*; 7A C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure*, §§1765-69.1 (1986) ("Wright and Miller"). These principles are, of course, fully applicable to the settlement context. Id. *at* §§1791 and 1797. 2 Newberg and Conte, *supra*, at ch. 11, collects the authorities on class action settlement.

[45] The complaint simply states that plaintiffs are MCA shareholders. J.A. 136, ¶ 7. There is no allegation, to say nothing of a finding on the record, that plaintiffs continued to hold their shares and tendered them, rather than selling them before December 31 or taking cash in the short form merger that followed the tender offer. Only those who tendered have Exchange Act claims. Pet. App. 11a & n.16; J.A. 83, 99.

names appear in the settlement complaint. J.A. 133. In *Prezant*, *supra*, 636 A.2d at 925-26, the Delaware Supreme Court rejected a settlement because the record did not contain a finding of adequate representation. Here, after his own opinion noted "suspicions" of "collusion", the Delaware vice chancellor subsequently signed a formal order prepared by counsel reciting the existence of "adequate representation." J.A. 204-205. That "finding" is not the product of an inquiry as both *Prezant* and *Shutts*, 472 U.S. at 809, require, if absent parties are to be bound. *Prezant* makes plain that such a finding is not a matter of form and that a baseless finding is not sufficient. 636 A.2d at 924-25. Findings "on the record" are required. *Id.* The court disapproved any chancery practice to the contrary. *Id.* at 925. It stated that "[t]he court may make such a finding on the basis of a record containing sworn testimony, by affidavit and/or deposition." *Id.* Satisfaction of this requirement, "*in every class action*", the court noted, is necessary if "[d]efendants [are to be] protected from a possible collateral attack. . . ." (*Ibid.*).[46] (Emphasis in original.)

The chronology, however, reveals one important fact about the class plaintiffs. When their counsel sought class certification, *plaintiffs had no federal claims that they could assert*. Their federal claims could be litigated only if *respondents* prevailed on appeal. Otherwise, Delaware plaintiffs were barred by the statute

[46] Petitioners' unsupported claim that adequacy of representation was "litigated and decided" (Pet. Br. at 23) in Delaware is false, and in any event would not bind absent class members. Interestingly, the class settlement stipulation contained a proposed order that did not include even a finding of adequate representation. Cir. R. 57, Ex. G at Ex. D. Only after approving the settlement was the vice chancellor provided with an order reciting such a finding. J.A. 204-205. The Vice Chancellor did not think that issue in any way material, and his opinion says nothing favorable to adequacy. *See* p. 43, *infra*.

of limitations.[47] What is more, even if the plaintiffs could have asserted individual claims, any class action would be barred by limitations.[48] Surely, inadequate representation exists as a matter of law when a class representative releases claims that he or she has no power to assert in any court.[49]

2. Class Counsel. In fact, of course, the Delaware plaintiffs' *lawyers* were the only "representatives" of whom the Delaware court took heed, and, even then, only through argument, and not sworn testimony or affidavit.

(a) Inherent Conflict of Interest. A person is not bound by a representative where "there was a substantial divergence of interest between him and the members of the class . . ." *Restatement (Second) of Judgments*, *supra*, §42(d).

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[47] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) states that 1934 Act claims must be brought within one year of discovery. Under *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the statute is tolled once the complaint is filed unless the district court denies certification. The court did so in April of 1991 and again on September 6, 1991. D.R. 98, 173. When the settlement was announced in October 1992, the statute had run even if September 6, the second *Epstein* certification denial, is viewed as the trigger date. *Davis v. Bethlehem Steel Corp.*, 769 F.2d 210 (4th Cir.), *cert. denied*, 474 U.S. 1021 (1985).

[48] Tolling does not extend to new class action claims. See *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988): "[T]he courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class." See *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n.*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987).

[49] Such a representative does not meet the requirements of *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982); *Shutts*, *supra*, 472 U.S. at 809-810.

When in October of 1992 they applied to act as class counsel their clients had no federal rights they could assert. *Delaware counsel had every incentive to compromise substantial federal claims*. The state claims, they had previously been authoritatively told, were worthless, and they had in fact been abandoned. J.A. 159, 167. Counsel had also previously denigrated the federal claims, and in any event could not litigate them. The result: If they settled the federal claim, counsel would get paid; if they litigated, they would get nothing. Such a one-sided incentive structure is surely a constitutionally disabling conflict of interest for class counsel who stand in a fiduciary relationship to the class.[50] *Cf. Tumey v. Ohio*, 273 U.S. 510, 523 (1927). See *Zarowitz v. BankAmerica Corporation*, 866 F.2d 1164, 1166 (9th Cir. 1989). Put another way, a class settlement violates due process when, as here, the class is created for settlement purposes only and the settlement is intended to have preclusive effect on pending litigation with respect to federal claims that class counsel -- as petitioners fully realized -- has no intention or ability to prosecute.[51]

(b) Counsels' Conduct. Counsels' conduct fell below the minimum standards required for adequate representation under the due process clause. Counsel made no effort whatsoever to determine the basis of respondents' belief that they would prevail in the Ninth Circuit, whether there were settlement negotiations, or the status of the extensive discovery in federal

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[50] "The class action remains . . . a very troublesome procedure. A chief problem is protecting the class members not only [from the representative] but also from the more serious possibility that the class lawyer (also usually self appointed) has interests that conflict with those of the other clients." James and Hazard, *supra*, at 564.

[51] "When competition among different sets of plaintiffs' counsel exists, as it does here, there is the ever present danger that unscrupulous counsel may 'sell out' the class in order to receive a fee." *Prezant v. De Angelis*, *supra*, 636 A.2d at 922. See also *General Motors*, *supra*, 55 F.3d at 801-804 (reviewing the authorities).

court. Instead, counsel simply filed a memorandum of law supporting the October settlement. J.A. 289. Their entire focus was how unlikely it was that respondents would win their appeal in a manner that benefitted the class.[52] Cir. R. 57, Ex. N.

The memorandum did not present the issues in the federal appeal in a manner consistent with what the Constitution demands if the rights of absent class members are to be compromised. For example, the memorandum (J.A. 293-95) explained how unlikely it was that the Ninth Circuit would find a private right of action without mentioning that the Second and Third Circuit opinions authored by Judges Winter and Becker had already found such a right (Pet. App. 11a), or that the district court's conclusions of law (which were drafted by petitioners) had acknowledged such a right. Pet. App. 52a-53a. Nor did counsel mention that petitioners had conceded the existence of such a right of action in their brief on appeal. Pet. App. 5a n.9.

Counsels' presentation of the class action aspects of the federal litigation was similarly marred. The claim that Wasserman received a higher consideration contrary to rule 14d-10 alleged a class action indistinguishable from the hundreds of securities fraud actions. (The Ninth Circuit held that it "fits . . . like a glove." Pet. App. 40a-41a.) Asserting that reversal was unlikely, the memorandum went on to suggest that there could be no class recovery, even if the Ninth Circuit did reverse. J.A. 295-96. At oral argument, Delaware counsel drove that point home: "There is no class in the so-called 'federal class actions.' Thus, absent class members cannot, *in the present posture or in any posture that I can envision, have any benefit from that proceeding*. The

[52] Five pages were devoted to the state law claims; sixteen to *Epstein*. J.A. 290-292. Thus, the Delaware brief's subheadings are such arguments as "It is unlikely that the Ninth Circuit will find SEC Rules 10b-13 and 14d-10 provide a private right action." J.A. 293.

persons who might benefit, if at all, if a number of remote scenarios took place, would be the *individual* plaintiffs, and even there they must obtain a reversal of their decisions in that court." J.A. 226-227. These assertions were plainly false, as evidenced by the results of the *Epstein* appeal.

In terms of their impact on the Delaware proceedings, counsel's most significant misstatements concerned the district court's adverse finding on damages. The memorandum asserted that "*it is doubtful that the Ninth Circuit will overturn the Federal District Court's factual finding that Mr. Wasserman did not receive higher consideration....*" J.A. 295. This is a striking misrepresentation. Although the "findings" petitioners submitted *post hoc* to the district court's decision included a finding on damages (Pet. App. 50a, 58a-59a), [53] they never moved for summary judgment on damages (Pet. App. 19a-20a n.20), and *their briefs in the Ninth Circuit, made no effort to argue otherwise*. Cir. R. 27. The briefs were filed *before* the Delaware proceedings. Delaware counsel presented an obviously erroneous finding to the state court as though it were true, and petitioners' counsel made no effort to correct the misstatement.

Finally, we invite the Court's attention to the terms of the release. That release absolved Delaware counsel from any liability for their conduct in the Delaware litigation. Pet. App. 74a-75a. Surely, a disabling conflict of interest exists when class counsel releases federal claims in the circumstances shown here, and also

[53] That "finding" was contained in a document submitted by petitioners' counsel long after the court had granted summary judgment. Pet. App. 45a. Despite clear Ninth Circuit disapproval of the practice (*see Mattel, Inc. v. Hyatt*, 664 F.2d 757, 759 (9th Cir. 1981)), the court simply signed the document, after making three minor changes. D.R. 502 at 8, 11, 21. Although not revealed in the Joint Appendix, the "court's" findings were made on counsels' letterhead. *Compare* D.R. 502 to Pet. App. 45a.

simultaneously purports to preclude counsel's "clients" from any possibility of maintaining even a meritorious malpractice action.[54]

B. Inadequate Judicial Supervision. In approving the second settlement, the vice chancellor's conduct fell below the minimum standards required by due process if the rights of thousands of shareholders were to be effectively precluded on the basis of representation.

The vice chancellor, it will be recalled, had initially rejected the first settlement as "illusionary" (J.A. 171), and said that plaintiffs' state law claims were worthless. J.A. 167, 171. He recognized that the only beneficiaries of the first settlement proposed were Delaware plaintiffs' counsel. J.A. 170-71. Nonetheless, he approved the second settlement. Pet. App. 63a. Once again, he acknowledged that the state law claims were worthless. Pet. App. 68a. He gave no independent scrutiny to the merits of the federal claims. Pet. App. 27a. He recognized that the settlement's benefits were "meager." *Id. Far more important, however, he made no inquiry on the record as to the purported class representatives, or as to the adversarial character of the settlement proceeding*, even though he acknowledged "*suspicions*" *of "collusion."* He simply said, "Suspicion, however, is not enough and the objectors have offered no evidence of any collusion." Pet. App. 70a. The vice chancellor effectively shifted the burden of proof on matters where his inquiry was required, whether or not there were objectors.[55]

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[54] Space limitations preclude any extended analysis of the deficiencies in the proposed notice of settlement. The *Epstein* litigation was disparaged (Pet. App. 88a-90a), and more importantly, class members were wrongly told that they must pursue their claims *individually* in California. Pet. App. 96a.

[55] He was sufficiently troubled by the settlement, however, that he cut the request for counsel fees -- a request that itself was less than

The vice chancellor here was also the vice chancellor who presided in *Prezant*. In both cases, it is clear that he believed that, in the settlement context, the *only* issue involved in approval of a settlement was his judgment on its fairness. In neither case was he concerned about the existence of the class or the adequacy of its representation.[56] Adequate representation is, however, the fundamental legitimizing ground for all class actions. It must exist "*at all times.*" *Shutts*, *supra*, 472 U.S. at 812; *Prezant v. De Angelis*, *supra*, 636 A.2d at 923 (emphasis in original), and the judge must affirmatively satisfy himself of that fact. *Shutts*, *supra*, 472 U.S. at 809-10 (judge must "conduct an inquiry into . . . the adequacy of representation"); *Prezant*, *supra*, 636 A.2d at 923.

The "non-traditional character" of the class action is precisely the reason why a judge cannot act in as passive a role as would be allowable when all that is involved is a settlement between individual litigants.[57] The judicial duty to scrutinize is particularly imperative where classes are certified for settlement only. *Prezant v. De Angelis*, *supra*, 636 A.2d at 921 (after making clear the special dangers of abuse in settlement class

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counsels' initial request even though presumably they had done more work and they had now produced a "successful" settlement. Pet. App. 70a-72a.

[56] It should be recalled that, when the settlement is first proposed and notice issued, no finding regarding representation occurs. *See* J.A. 198-203. The purported representative acts solely as a result of a stipulation between the litigants. *Prezant*, *supra*, 636 A.2d at 923.

[57] *Protective Committee for Independent Stockholders v. Anderson*, 390 U.S. 414, 424 (1968) (making precisely this distinction in reorganization proceedings approving a compromise). *See also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). "[A] court may not delegate to counsel the performance of its duty to protect the interests of absent class members." *Plummer v. Chemical Bank*, 668 F.2d 654, 659 n.4 (2d Cir. 1982); Newberg and Conte, *supra*, §1164 at 11-177. See also *Prezant*, *supra*, at 921; *General Motors*, *supra*, 55 F.3d at 805.

actions, the court emphasized the need for judicial participation because "*settlement of a class action is unique because [of] the fiduciary nature of the class action*"); *General Motors*, *supra*, 55 F.3d at 805 (describing "fiduciary responsibility" of courts, and "the need for a special focus on precluding the existence of collusion").[58] Judicial scrutiny is surely clearly imperative when, as here, the vice chancellor "made findings from which it may be inferred that [the class representative] is an *inadequate* class representative." *Prezant*, *supra*, 636 A.2d at 924.

* * *

Petitioners' only response to the due process objections is to assert that because the terms of the settlement were known and there was a right to opt out there can be no due process claim (Pet. Br. at 20-21). This is simply a corollary to their "contract" theory, and as we have observed the Delaware Supreme Court squarely rejected the *identical* argument in *Prezant*, and the very authorities upon which petitioners rely.[59] Viewed in terms of federal constitutional law, the theory is preposterous. Petitioners necessarily assert that a totally corrupt settlement is effective against those who do not flee.

The opt-out right does not substitute for adequate representation or adequate judicial supervision of the class action

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[58] In the settlement context, "[t]he court needs to be sensitive to the possibility that attorneys or parties have conflicts of interest." *Manual for Complex Litigation (Third)*, §23-14 at 171-72 (1995). Where classes are certified for settlement only, "closer judicial scrutiny (is required) than approval of settlements where class certification has been litigated." *Id.* at §30-45 at 243.

[59] In *Prezant v. De Angelis*, 636 A.2d at 924, as here, the settlement terms were known and there was a right to opt out. Defending the need for adequate representation, the Delaware Supreme Court said "We . . . reject defendants' assertion that notice and the opportunity to opt out without adequate representation, satisfies due process requirements."

proceeding. The opt out right accommodates those who want personal control of their claims; it does not substitute for protection of interests of absent class members though adequate representation and adequate judicial supervision of the class action settlement when that settlement is intended to bind absent class members. Moreover, for most persons an opt-out opportunity is largely illusionary, as *Prezant* recognizes.[60]

POINT III. The Delaware Settlement Release Proceeding Violated the Supremacy Clause

Petitioners (pp. 27-31) expend much argument on the protections accorded by "Our Federalism", but they utter not a word about state interference with federal law. Our federal system is a two-way street. At least since *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), this Court has rejected efforts by states to interfere with the instrumentalities of the national government. In particular, the Court has long been sensitive to

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[60] *Prezant*, *supra*, 636 A.2d at 924 (opt-out rights "are infrequently used and usually economically impracticable"). "Only a small number of absent class members normally elect exclusion in Rule 23(b)(3) class actions." 3 Newberg and Conte, *Newberg on Class Actions*, §16.16 at 16-89 and n.204 (3d ed. 1992). This is true of securities litigation. Petitioners' Exchange Act opt-out refrain is really an argument that class actions to enforce liability are maintained at state court sufferance in the courts to which Congress gave exclusive jurisdiction.

Indeed, as a general matter, opt-out settlements exacerbate adequacy of representation problems because, in contrast to a 23(b)(2) settlement, those whose economic stake is greatest have a strong incentive to opt-out if they believe the settlement unfair. An opt-out was of no assistance to respondent Epstein. Although he owned one thousand shares, his individual claim was still too small to pursue even if defendants had conceded liability. D.R. 429, Ex. C.

impermissible state law intrusions on federal court jurisdiction.[61] The Court's decisions establish that a litigant's right of access to the courts of the United States is derived from the Constitution and Acts of Congress. "Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented. . . . That right . . . cannot be taken away by the State." *Donovan*, *supra*, 377 U.S. at 413. Whatever the general efficacy of Delaware efforts to affect Exchange Act rights, this proceeding could not do so because that result would contravene the supremacy clause (Art. VI).[62] Fundamental principles of "Our Federalism" mandate that conclusion.[63]

The state proceeding convened by these petitioners and Delaware counsel was a manifest interference with the exclusive authority of the courts of the United States. No substantial state claims existed and they were not being prosecuted in any way. Pet. App. 68a. Moreover, the state law claims did not overlap

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[61] The Court has rejected efforts by state legislatures to confine litigation to the state courts. *E.g.*, *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall) 270 (1871); *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922). And it has similarly rejected state court injunctions against proceedings in federal courts. *Donovan v. Dallas*, 377 U.S. 408, 413 (1964); *General Atomic Co. v. Felter*, 434 U.S. 12, 17-19 (1977).

[62] *Newton v. Rumery*, 480 U.S. 386 (1988), is instructive here. There, a 5-4 majority refused to fashion a general rule that prohibited contractual release of §1983 claims in exchange for dismissal of criminal charges. *Id.* at 394-97. But all members of the court recognized that the general rule did not preclude challenge to *a specific* release. *Id.* at 401-02.

[63] *Younger & Harris*, 401 U.S. 37, 44 (1971). This assumes that somehow the state court order purports to discharge the federal claims. If the court views the issue as we believe it should, *i.e.*, what effect should be given to a representative's contract release of federal rights, then this argument applies *mutatis mutandis*.

with respondents' claims against petitioners. The entire thrust of the state court settlement proceedings centered on evaluating respondents' *federal* claim (J.A. 289-97), *a fact that alone justifies rejection of the state proceeding on preemption grounds*. If these Delaware settlement proceedings were not a direct attempt to exercise the powers reserved by § 27 to the judges of the United States, no such case will ever arise.

There is, however, an even deeper and more constitutionally offensive pattern disclosed here. Petitioners and Delaware counsel sought to remove the Ninth Circuit appeal to Delaware. The Delaware proceedings in this case are not an illustration of a good faith "race to judgment" between federal and state courts that is an inescapable feature of "Our Federalism." The state law proceeding was not being prosecuted "in any way." J.A. 79. The sole purpose of the settlement proceeding was to permit petitioners and other counsel to destroy the good faith class litigation of federal claims within the exclusive jurisdiction of the federal courts. The mechanism employed was contrived *post-hoc* state class action settlement of worthless and abandoned state law claims. Respondents were putative federal class fiduciaries, and their federal claims were on appeal. They were not obliged to surrender to petitioners' desire to convert a federal proceeding into a state one. If petitioners are successful, this would amount to a removal of the federal appeal to the Delaware court and force respondents to secure a *revocable* license from the state court to proceed further in a court of the United States.[64] What is more

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[64] To proceed further with their federal appeal, respondents would be required to go to Delaware and convince that court of one of two propositions: (a) that Delaware lacks power to affect the federal claims; or (b) the settlement itself was unfair. If Delaware rejected their claims, they would have to resort to Delaware appellate process, and ultimately review here. *Martin v. Wilks*, 490 U.S. 755, 763-764 (1989). (Even if respondents prevailed on the first objection, the same gauntlet must be

this entire process could be replicated elsewhere.[65] To some extent, as we have said, the race to judgment is a feature of Our Federalism. Not so here. To give effect to this Delaware proceeding would be profoundly contrary to our constitutional traditions.[66]

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run.) If they prevailed on the second objection, they faced the possibility of returning to Delaware yet another time to object to yet another settlement by class representatives other than themselves. In either event, respondents would through a form of involuntarily joinder now be subject to in personam jurisdiction and the ability to conduct further federal proceedings exist would be at sufferance of the Delaware class representative.

[65] As a practical matter, no other effective way exists to protect the federal rights here other than to deny the settlement/judgment preclusive effect. Plaintiffs' ability to secure protection from the lower federal courts is doubtful and burdensome. The power of the federal court to enjoin a pending state lawsuit (however dormant in fact) is limited by 28 U.S.C. §2283. While §2283 permits such an injunction "in and of its jurisdiction", this is a narrow exception. *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), makes plain that this narrow exception is not triggered simply because exclusive jurisdiction was in a federal forum. This is so, "even when [the state] interference is unmistakably clear." *Id.* at 294. *See also Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149 (1988). Moreover, there is a natural federal court reluctance to enjoin state proceedings, especially where, as here, our claim of interference depended upon a prediction that a vice chancellor who had already rejected one settlement as illusionary would nonetheless approve a second. There, moreover, are *bureaucratic* problems of getting a motion panel together and focused on the topic. (Indeed, we moved to advance argument in our case because of the Delaware proceeding. That tepid motion never even made it out of the clerk's office. J.A. 126; J.A. 127.) Finally, the whole injunctive process would result in a distracting side bar diversion over whether an injunction was -- or was not -- appropriate, further delaying proceedings.

[66] Lines may have to be drawn in other cases, but that is the nature of the adjudication. "[W]here to draw the line . . . is the question in pretty much everything worth arguing in the law." *Irwin v. Gavit*, 268 U.S. 161, 168 (1925) (Holmes, J.). If there is any line at all, this Delaware settlement judgment is clearly on the wrong side.

While rejection of *this* state settlement proceeding could be understood as an interpretation of the Congressional grants of jurisdiction to the federal courts, or as a matter of federal common law implementing those grants,[67] we believe, however, that the ground for rejecting the Delaware proceedings is the same as in *McCulloch*: inferences drawn from the structure and relationship of the national government. 4 Wheat at 426 *et seq.*[68] The Constitution of the United States does not contemplate the direct assault this record disclosed upon the jurisdiction conferred by Congress on the courts of the United States.[69]

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[67] The preclusive effect of federal court judgments on federal claims has long been governed by federal common law. 18 Wright & Miller, *supra*, at §4466. Moreover, even courts most receptive to state court release of federal claims recognize that the effectiveness of a release must pass muster under *federal* standards. *Newton v. Rumery*, *supra*, 480 U.S. at 392. Surely, § 27 and §1291 can sponsor limited federal common limits on state preclusion rules given the important federal interest in protecting the jurisdiction of the federal court. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). In fact, jurisdictional grants have been read to authorize the creation of whole bodies of substantive law. "Three [admiralty, interstate controversies, and §301 of Taft Hartley] of the most celebrated instances of law-making power by the federal courts are based on jurisdictional grants." Hart & Wechsler, *supra*, at 883.

[68] Charles Black, *Structure and Relationship in Constitutional Law* (1965); Henry P. Monaghan, *Constitutional Common Law*, 89 Harv. L. Rev. 1, 10-18 (1974).

[69] *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 353 n.12 (1980), where *federal* defendants unsuccessfully sought to preclude a class action by buying out the named plaintiffs by (unlike this case) tendering the plaintiff the maximum amount he could have recovered. The Court noted it could protect its authority "if a class action defendant were shown to have embarked on a course of conduct designed to insulate the class certification issue from appellate review in order to avoid classwide liability." What happened here is indeed far more constitutionally offensive than what happened in *Donovan*, *supra*, which provided "as strong as case as can be imagined for a state court injunction against federal *in personam* proceedings." Hart & Wechsler, *supra*, at 1331.

CONCLUSION

The judgment should be affirmed.

Date: September 15, 1995

Respectfully submitted,

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Under Texas law municipal bonds could not be issued so long as there was pending litigation challenging their validity. After the state courts had rejected the challenge, 27 of the state court litigants (and others) commenced an action in federal court making the same challenge. This court nonetheless held that the state court could not interfere with the federal proceeding. *Donovan*, *supra*, 377 U.S. at 411-414.

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No. 94-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORP.,

Petitioners,

vs.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 94-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORP.,

Petitioners,

vs.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PRELIMINARY STATEMENT

Respondents' brief is an extended detour around the question before the Court: "whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement released federal claims." Pet. for Cert. at i; *see also* Order granting certiorari. Unable to adduce any authority or policy supporting the Ninth Circuit's analysis, respondents advance "issues" regarding the severability of releases from judgments, the Supremacy Clause, the adequacy of class representation and due process, all of which respondents concede were not addressed by the Ninth Circuit and none of which is encompassed by the question accepted by the Court.

Respondents ask this Court to approve an arbitrary limitation on the established authority of a state court to enter a judgment approving a settlement of matters properly before the court, asserting that state courts are not competent to enter a judgment approving a class action settlement when the settlement includes a release of exclusively federal claims. Respondents concede, however, that a state court may approve the release of exclusively federal claims in an individual or derivative settlement. *See* Resp. Br. at 24 n.26. There is no principled basis for a different rule in the class action context, and any such distinction would undermine the policy of promoting the finality of class action settlements.

The linchpin of respondents' newly fashioned argument is that the Delaware judgment approving the class action settlement did not incorporate a release of claims. If the judgment did not incorporate a release, respondents argue, then the Ninth Circuit did not offend the Full Faith and Credit Act when it disregarded the state judgment. But respondents' assertion is demonstrably untrue. The judgment expressly released all claims arising out of Matsushita's tender offer for MCA, "including without limitation the claims asserted in the California Federal Actions." *See* J.A. 206.

The Full Faith and Credit Act presumptively applies to all judgments, and implied repeals of § 1738 -- which are disfavored and rare -- are not recognized absent a "manifest incompatibility" between § 1738 and the federal provision at issue. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 470 (1982). The argument that exclusive federal jurisdiction to adjudicate certain securities law issues is incompatible with granting full faith and credit to a state judgment entered on a consensual settlement controverts every decision of this Court construing the interaction of the Full Faith and Credit Act and subsequently enacted federal legislation. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 381 (1985); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984); *Allen v. McCurry*, 449 U.S. 90, 105 (1980); *see also Murphy v. Gallagher*, 761 F.2d 878, 885 (2d

Cir. 1985) (Exchange Act's "grant of exclusive jurisdiction . . . does not constitute a repeal [of §1738] by implication").

Respondents' assertion that the Supremacy Clause somehow "preempts" state courts from approving the release of "exclusively federal" claims in class action settlements is illogical. No coherent Supremacy Clause theory could preclude recognition of a judgment releasing securities law claims in class actions but allow such a release in individual or derivative actions. Thus, respondents' Supremacy Clause argument collapses of its own weight because respondents acknowledge (as did the Ninth Circuit) that state courts have the power to approve the settlement of exclusively federal claims in an individual or derivative action. *See* Resp. Br. at 20; Pet App. 37a-38a & n.32.

Finally, respondents challenge the Delaware judgment on the ground that inadequate representation of the class in the Delaware proceedings purportedly deprived the class of due process. But respondents concede the Ninth Circuit decision is not predicated on any due process issue. *See* Resp. Br. at 8. Moreover, adequacy of representation was an issue actually litigated and resolved in the Delaware courts, which found the representation of the class to be adequate. The Ninth Circuit properly did not revisit that finding. The class members here received notice and an opportunity to object or opt out. All but 19 of them in effect "opted in" by not objecting and by accepting the consideration paid in the settlement.

Respondents should not be permitted to sit out state court proceedings affecting the rights of the class and then sponsor in federal court an argument that could have been (and actually was) made in state court. Indeed, respondents' collateral attack on the competency and integrity of the Delaware courts only underscores the importance of § 1738 to the preservation of state-federal comity.

ARGUMENT

I. THE DELAWARE COURT RENDERED A JUDGMENT INCORPORATING A RELEASE OF THE CLAIMS NOW ASSERTED, AND THAT JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT

To avoid the consequence of § 1738, respondents now claim that they, and the Ninth Circuit, were "mistaken" in believing that the class release was incorporated in the Delaware judgment. Resp. Br. at 9. Respondents thus assert that the "Delaware judgment is irrelevant" to a § 1738 analysis because "[i]t is the release, not the judgment, that is presented to the federal court." Resp. Br. at 13, 10 (emphasis omitted). This invention is a dramatic reversal of their prior position, and the argument is without merit.

A. The Delaware Judgment Incorporates a Release of All Claims, Expressly Including the Federal Claims

The final judgment rendered by the Chancery Court states:

> All claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise) ... [asserted] in connection with or that arise now or hereafter out of the ... Tender Offer ..., including without limitation *the claims asserted in the California Federal Actions ... are hereby compromised, settled, released and discharged with prejudice* by virtue of the proceedings herein and this Order and Final Judgment.

J.A. 205-06 (emphasis added).

The Ninth Circuit recognized that the Delaware judgment expressly provides for a release. Pet. App. 24a. No alternative interpretation of the plain words of the judgment is possible. Indeed, a class action settlement cannot be achieved without

court approval, as two United States Courts of Appeals have recognized. In *Nottingham Partners v. Trans-Lux Corp.*, the First Circuit enforced a state court judgment and release as written, holding that "*the release embedded in the Delaware judgment* was ... valid and enforceable as a matter of federal, as well as state, law." 925 F.2d 29, 34 (1st Cir. 1991) (emphasis added). Similarly, in *Grimes v. Vitalink Communications Corp.*, the Third Circuit observed:

> When the parties in a pending case negotiate a settlement, the resulting court order dismissing the case is a final judgment in that lawsuit. As a judgment, the settlement and release of claims is a contract that not only is agreed upon by the parties, but also is stamped with the imprimatur of the court with jurisdiction over the parties and the subject matter of the lawsuit.

17 F.3d 1553, 1557 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994); *see also* Pet. Br. at 23-25.[1]

B. Under the Full Faith and Credit Act, the Ninth Circuit Was Required to Enforce the Delaware Judgment

It is settled law that a federal court must determine the scope and effect of a state judgment and release on federal claims pending in federal court. *See, e.g., Marrese*, 470 U.S. at 381-82; *Grimes*, 17 F.3d at 1561-62; *Nottingham*, 925 F.2d at 33-34. This rule is a corollary of the principle that no court can conclusively determine the preclusive effect of its own judgment. *See Marrese*, 470 U.S. at 381-82. But the appropriate federal court review of the scope of a state court judgment requires the reviewing court to interpret the judgment and release in the manner it would be interpreted under state

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[1] Respondents avoid reference to the First Circuit's decision in *Nottingham* and the Third Circuit's decision in *Grimes*, both of which held -- even in the context of *non*-opt out settlements -- that state courts may approve a class action settlement releasing exclusively federal claims.

law. *See, e.g., Marrese*, 470 U.S. at 380-81; *Kremer*, 456 U.S. at 466-67; *In re Nourbakhsh*, No. 94-55192, 1995 WL 569638, at *1 (9th Cir. Sept. 28, 1995).[2]

As a matter of comity, a state court rendering a judgment upon a class action settlement does not "dismiss" (or direct the federal court to dismiss) any claims that are governed by the settlement. The Delaware courts acknowledge that only a federal court may determine the effect of a judgment and release on claims pending in federal court. Respondents twist this acknowledgement to argue that the Delaware judgment is not entitled to full faith and credit. Respondents claim *Nottingham Partners v. Dana*, 564 A.2d 1089, 1104 (Del. 1989), holds that "[i]t is the *release, not the judgment*, that is presented to the federal courts." Resp. Br. at 10 (emphasis retained). *Dana* in fact holds:

> We conclude that the Court of Chancery's approval of the release, *as part of the Settlement and Order of Final Judgment*, does not in any way interfere with or limit the jurisdiction of the Massachusetts federal court.

Dana, 564 A.2d at 1105 (emphasis added). *Dana* thus recognizes that Delaware courts cannot dismiss, or direct the federal court to dismiss, exclusively federal claims released pursuant to a Delaware judgment. But that does not mean that the state court has not entered a judgment containing a release of federal claims. Obviously, it has. Simply stated, the federal court cannot treat the claims released as if they had not been released. It is a gross perversion of Delaware law for respondents to take Delaware's recognition -- grounded in *comity* -- that only the federal court may dismiss the released claims, and attempt to turn it into an end run around § 1738 and the Delaware judgment.[3]

[2] Respondents do not dispute that the Ninth Circuit failed to apply Delaware preclusion law. *See* Pet. Br. at 25-26. A state court-approved class action release bars prosecution of federal claims so long as the release satisfies three criteria: (1) it applies to the federal plaintiffs, (2) it encompasses the federal claims, and (3) it is legally enforceable. *Nottingham*, 925 F.2d at 32. As the First Circuit noted, once it is established that the federal plaintiffs were members of the Delaware class — a fact undisputed here — "[t]he rest follows inexorably." *Id.*

Respondents argue that a release incorporated in a judgment has no independent effect, because a judgment can have only issue or claim preclusive effect. Resp. Br. at 9, 14. However, a release incorporated in a judgment has preclusive effect independent of issue or claim preclusion, because the parties so intend and contract. *See Nottingham*, 925 F.2d at 34; *see also Cohen v. Resolution Trust Corp.*, 61 F.3d 725, 729 (9th Cir. 1995) ("[a] class action settlement, like the settlement of any other legal claim, is a 'private consensual agreement negotiated between the parties'") (citations omitted); *cf. Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 522 (1986) ("it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree").

Releases given in civil cases ordinarily release all claims available to the claimant, regardless of subject matter. Pet. App. 38a. As the Ninth Circuit recognized, a judgment incorporating a release of claims by an individual or corporation (as in the case of a derivative action settlement and release) has preclusive effect beyond issue or claim preclusion. *See*

[3] Respondents also argue that the Delaware judgment is not "final" because a federal court may determine its effect on claims pleaded in that court. All case law is to the contrary. *See, e.g., Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 593 (7th Cir. 1993) (judgment entered on state court class action settlement is final for preclusion purposes). An otherwise final state court judgment does not become non-final if a federal court subsequently undertakes to assess its scope and effect, any more than a state court's assessment of the scope of a federal court judgment could make that federal court judgment non-final. *See Playtex Family Prods., Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 684 n.2 (Del. Super. Ct. 1989) (judgment of trial court final for res judicata purposes even if appeal is taken), *op. entered*, 1990 WL 35299 (Del. Super. Ct. 1990).

Pet. App. 37a-38a & n.32. No logical distinction justifies giving different treatment to a class settlement that has satisfied the requirements of due process, as the First and Third Circuits have recognized. *Grimes*, 17 F.3d at 1563 ("the language of this broad release manifests an intent by the parties to settle all claims arising from the merger transaction"); *Nottingham*, 925 F.2d at 31-32 ("[i]t is beyond cavil that a suit can be barred by the earlier settlement of another suit *in either of two ways*: res judicata or release") (emphasis added); *see also Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305, 315 (7th Cir. 1980) ("settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants").[4]

II. THE FULL FAITH AND CREDIT ACT REQUIRES FEDERAL COURTS TO GIVE THE DELAWARE JUDGMENT EFFECT UNDER DELAWARE LAW, AND THE EXCHANGE ACT DOES NOT CREATE AN EXCEPTION TO THAT MANDATE

Section 1738 presumptively applies to all judgments, and implied repeals are disfavored. *See Kremer*, 456 U.S. at 468. No exception to the Full Faith and Credit Act may be recognized unless the "concerns underlying a particular grant of

[4] As petitioners demonstrated in their opening brief, the Delaware action involved the same alleged wrongdoing that was at issue in the federal action. *See* Pet. Br. at 43 n.35. Indeed, the Ninth Circuit acknowledged that "the federal and state claims arose out of the same transaction." Pet. App. 34a. In seeking to avoid the clear preclusive effect of the Delaware judgment, the Ninth Circuit enunciated an unprecedented and unworkable inquiry into whether the federal and state claims shared an "identical factual predicate" (Pet. App. 33a), which requires the federal court to conduct an exceedingly detailed, *post hoc* hypothetical construction of how the state action would have been adjudicated had it not been settled. *See* Pet. Br. at 37-45.

exclusive jurisdiction justify a finding of an implied repeal of § 1738." *Marrese*, 470 U.S. at 386.[5]

As petitioners demonstrated in their opening brief, neither the plain language of the Exchange Act (or the Williams Act) nor its legislative history reveals a congressional intent to override § 1738 in the context of a state court judgment entered on a consensual settlement. But only such plain language or manifest intention would permit a federal court to deny preclusive effect to a state court judgment incorporating a release of Exchange Act claims. *See* Pet. Br. at 31-34; *Marrese*, 470 U.S. at 381 (the presumption against implied repeals of § 1738 applies even "in a lawsuit involving a claim within the exclusive jurisdiction of the federal courts").

The Ninth Circuit concluded that "the policy of finality of judgments is plainly outweighed" when a state court "exercise[s] judicial power" over exclusively federal claims. Pet. App. 28a n.25. But the policy of finality is strong. *See McCleskey v. Zant*, 499 U.S. 467, 493 (1991). It can be outweighed only if full faith and credit will interfere with a more compelling federal policy. Approval of a settlement, and *a fortiori* an opt-out settlement, is *not* an exercise of judicial power over federal claims and does not interfere with any federal policy. A court approving a settlement and release does not *adjudicate* the rights or liabilities of the parties and the federal interest in achieving uniformity in adjudications of exclusively federal claims is not implicated when a state court approves a settlement that includes the release of federal claims. *See Local No. 93*, 478 U.S. at 522-23; *Nottingham*, 925 F.2d at 33-34; *Dana*, 564 A.2d at 1104-05.[6] In short, *no*

[5] Respondents disparage this Court's full faith and credit jurisprudence as "awkward" because in their view Congress' enactment of the Full Faith and Credit Act in 1790 was not intended to "affect" federal claims. Resp. Br. at 28 n.31. This Court has expressly rejected respondents' position. *See, e.g.*, *Marrese*, 470 U.S. at 380-81.

[6] Respondents cite *Local No. 93* for the proposition that "a consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction." Resp. Br. at 20-21. *Local No. 93* in fact holds that "a

(Footnote continued)

federal interest is implicated by a consensual class release of exclusively federal claims, much less a federal interest sufficient to justify the wholesale nullification of a traditional function of the state judiciary.

A. The Delaware Judgment Approving a Settlement That Released "Exclusively Federal" Claims Did Not "Remove" an Exclusively Federal Claim

Respondents further attempt to circumvent § 1738 by arguing that the Delaware proceedings constituted a "removal" of an appeal from the Ninth Circuit to state court. Resp. Br. at 47. But a state court class settlement releasing federal claims "does not in any way interfere with or limit the jurisdiction" of a federal court. *Dana*, 564 A.2d at 1105; *see also Grimes*, 17 F.3d at 1563-64; *Nottingham*, 925 F.2d at 33-34.

Respondents' "removal" theory is a play on words. It conveys the erroneous impression that the Delaware settlement interfered with viable claims held by a properly constituted federal class. Significantly, at the time the settlement was negotiated and approved there was no pending federal claim and no federal class, because the district court had denied class certification and granted summary judgment dismissing all the claims. Moreover, the opt-out right assured every class member the right and the opportunity, by opting out, to pursue the federal claims described in the class notice.

Respondents' claim that they are not bound by the Delaware judgment ultimately is rooted in the assumption, accepted by the Ninth Circuit, that federal courts have authority

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federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." 478 U.S. at 525. This Court reasoned that because the consent decree was premised on the parties' consent, it could encompass matters outside the court's remedial powers. *Id.* Any statutory limitations placed on the court "simply do not apply when the [parties'] obligations are created by a consent decree." *Id.* at 523; *see also* Pet. Br. at 15-16 & n.14.

to override a state court judgment and the choices made by class members who decline to opt out of a settlement. This assumption would destroy the character of opt-out class action settlements, in which class members decide whether to participate in a proposed settlement or to preserve their claims by excluding themselves from the settlement class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985); *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 319, 336 (E.D. Pa.), *app. docketed*, No. 94-1927 (3d Cir. 1994). In this case, a federal class could be properly constituted only if a sufficiently numerous group of class members had elected to opt out of the settlement. Thus, if hundreds of members of the Delaware class had opted out, and the other requirements of Fed. R. Civ. P. 23 were satisfied, a federal class might properly have been constituted. But only 19 members elected to forego the settlement consideration and opt out. It was a subversion of the class action mechanism for the Ninth Circuit to order the certification of a federal class where the would-be members of that class had already elected to release their claims in exchange for consideration in the Delaware settlement.

B. Respondents' Supremacy Clause Analysis Is Irrelevant; The Issue Is the Relationship of Two Federal Statutes, Section 1738 and the Exchange Act

Instead of addressing the issue of implied repeal, respondents undertake a misdirected discussion of the Supremacy Clause. *See* Resp. Br. Point III. Apparently, the contention is that because an Exchange Act claim may only be adjudicated in federal court it can be resolved by settlement contract only under the auspices of a federal court. However, the Ninth Circuit decision could not be predicated on the Supremacy Clause. First, it is undisputed that a state court may approve the release of exclusively federal claims in individual and derivative actions. Pet. App. 38a. If the Supremacy Clause prohibits the release of exclusively federal claims in a state court class action, the Supremacy Clause would also prohibit it in those other contexts as well.

Second, respondents cannot reconcile their Supremacy Clause argument with the undisputed fact that Exchange Act claims may be *adjudicated* outside of federal court, including in arbitration, in state court when raised as affirmative defenses, and by foreign tribunals when principles of forum non conveniens counsel dismissal of a federal action. *See* Pet. Br. at 18-19 & n.17; *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 484 n.12 (1981) ("exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally even if it would not have subject-matter jurisdiction over a case raising the question directly"). These exceptions to "exclusively federal" jurisdiction confirm what the legislative history of the Exchange Act and *Murphy v. Gallagher*, 761 F.2d at 885, demonstrate: there is no basis in the Exchange Act to find an implied repeal of § 1738 for a judgment entered on a settlement.[7]

Finally, this Court has repeatedly stated that the central inquiry under the Supremacy Clause is "to decide if a state rule conflicts with or otherwise 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the federal law." *Lividas v. Bradshaw*, 114 S. Ct. 2068, 2076 (1994) (quoting *Brown v. Hotel Employees*, 468 U.S. 491, 501 (1984)) (internal quotation marks and citation omitted in original). The only interests implicated by a con-

[7] Respondents cite no case law supporting their position. In *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964), this Court held only that a state court may not enjoin the prosecution of an action pending in federal court. Delaware courts consistently have rejected any provision of a class action settlement that would enjoin the prosecution of litigation pending in federal court. *See, e.g.*, *Dana*, 564 A.2d at 1104. Neither *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 352 n.12 (1980) (respondents cite only to the dissent, without attribution, *see* Resp. Br. at 49 n.69), nor *United States v. Fausto*, 484 U.S. 439, 455 (1988), involve the Supremacy Clause or the Full Faith and Credit Act. Respondents' reliance on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819), in which this Court held that federal immunity from state taxation is "the unavoidable consequence of that supremacy which the constitution has declared," exemplifies the disjunction between respondents' case citations and their contentions about the Supremacy Clause.

sensual release are those of affording litigants an efficient mechanism for resolving disputes in one forum, relieving federal courts of unwarranted burdens, and promoting freedom of contract and finality. *See* Pet. Br. at 17, 45-49; *see also Marrese*, 470 U.S. at 385; *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982); *Thompson v. Edward D. Jones & Co.*, 992 F.2d 187, 191 n.5 (8th Cir. 1993).

III. THE ADEQUACY OF REPRESENTATION WAS ADJUDICATED BY THE DELAWARE COURTS IN PROCEEDINGS AT WHICH RESPONDENTS HAD A RIGHT TO BE HEARD, AND THAT DETERMINATION IS CONCLUSIVE

A. The Ninth Circuit Opinion Is Not Predicated Upon Any Due Process Issue

Respondents invite this Court to find constitutional infirmity in the Delaware proceedings based on alleged inadequate representation and judicial supervision. Resp. Br. at 34-45. As respondents concede, the Ninth Circuit's holding is *not* predicated on these fact-specific issues. Resp. Br. at 8. Accordingly, this Court should decline to address them. *See Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 86 (1988) ("[w]e shall deal with the case as it came here and affirm or reverse based on the ground relied on below"); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) ("we do not ordinarily consider questions not specifically passed upon by the lower court").[8] In any event, respondents deliberately waived the right to raise a due process challenge in the state courts. *See Retired Chicago Police Ass'n*, 7 F.3d at 592 n.6

[8] Respondents' failure to object in Delaware to the state court's subject matter jurisdiction estopped them from raising that argument in the Ninth Circuit -- and therefore in this Court on certiorari to the Ninth Circuit. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982). Like *amicus* C.L. Grimes, respondents would have the lower federal courts sit in review of state courts.

("To the extent plaintiffs are questioning whether the prior state court [settlement] proceeding met minimum due process requirements, we note that the state trial court allowed them to present their views at the settlement hearing, and the fairness of the settlement was upheld on the plaintiffs' state court appeal."); *Laskey v. International Union, United Auto., Aerospace & Agric. Implement Workers (UAW)*, 638 F.2d 954, 957 (6th Cir. 1981) ("[s]ince appellants had the opportunity to object to the legal representation at the prior settlement hearing . . . appellants are collaterally estopped from now asserting that the legal representation was not adequate"); *see also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 484 n.16 (1983) (noting the recognized "competence of state courts to adjudicate federal constitutional claims").

B. Respondents and Every Class Member Received Full Due Process

Adequacy of representation was litigated in the Delaware Chancery Court, which found the class representation adequate. J.A. 204-05. This finding was affirmed by the Delaware Supreme Court. Pet. App. 76a. As petitioners demonstrated in their opening brief, these findings are entitled to issue preclusive effect. *See* Pet. Br. at 23 n.20; *compare* Resp. Br. at 8 (incorrectly asserting that petitioners "reject[ed]" any reliance on issue preclusion).

There is no policy that would permit a collateral attack based on allegedly inadequate representation when, as here, the class members were afforded notice, and an opportunity to object or opt out, and when the issue of adequacy of representation was actually litigated in state court. *See Allen*, 449 U.S. at 104 ("There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all."); *cf. Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (collateral attack permitted where absent class members not afforded notice or

opportunity to be heard). Respondents cite no case to the contrary.

C. Adequacy of Representation Is a Matter of Judicial Determination, Reinforced by the Right to Opt Out

Class actions are a mechanism for a single, binding adjudication of multiple claimants' rights, while assuring due process to absent class members and repose to defendants. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("the class-action device saves . . . resources . . . by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23"); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1974) ("the principal function of a class suit" is to avoid multiple suits by binding absentees). In a class action settlement, a court authorizes class representatives to enter into a settlement on behalf of the class, and the representatives thereafter submit the settlement to the court for approval at a fairness hearing. *See, e.g.*, Fed. R. Civ. P. 23(e); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 173-80 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981). Due process mandates that class members receive notice describing the effect of the settlement, be afforded an opportunity to object (*e.g.*, to the adequacy of the settlement and representation) and, in appropriate circumstances, be afforded the opportunity to opt out. If the court finds that requisite procedural protections have been met and the settlement is fair, the class members who do not opt out are bound. *See, e.g., Shutts*, 472 U.S. at 808; *General Tel.*, 457 U.S. at 160-61; *American Pipe & Constr.*, 414 U.S. at 550.

The Delaware settlement here complied with the procedure sanctioned by this Court. The proposed settlement described the claims to be released and the court authorized the representatives to represent the class in connection with that proposed settlement. J.A. 187-88, 198. The class members were informed that the settlement released all claims arising out of the Matsushita tender offer, specifically including the claims

asserted in the California federal actions. Pet. App. 93a-94a. They were given the opportunity to opt out and to object and were advised that their failure to object would forever bar them from raising objections in the Delaware proceeding or any other action. Pet. App. 96a-99a. At the fairness hearing, the Chancery Court considered the arguments of the objectors -- including the same arguments as to adequacy of representation made by respondents here -- and approved the settlement as fair. Pet. App. 67a-70a. That decision was affirmed on appeal by the Delaware Supreme Court. No review in this Court under 28 U.S.C. § 1257 was sought. Those class members who chose not to opt out -- including respondents here -- accepted and received the financial proceeds of the settlement respondents now disclaim.[9]

Shutts makes clear that a class member who is afforded an opportunity to opt out, but who fails to exercise that option, is deemed to have consented to the personal jurisdiction of the state court, and therefore will be bound by any judgment entered in the state court. 472 U.S. at 811-12. Reviving an argument rejected by this Court one decade ago, respondents assert that opt out rights are inconsequential. *See* Resp. Br. at 17-18 & n.16. ***But see Shutts***, 472 U.S. at 813 ("the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so"). *Shutts* recognizes that

[9] The holding of the Chancery Court and Delaware Supreme Court that representation was adequate is supported by the record in Delaware. *See* Pet. Br. at 40 n.31. Class counsel appeared before the Chancery Court and submitted a record of discovery taken in litigation and the negotiations between the parties. J.A. 174-77, 186. Respondents attack class counsel as inadequate, but never explain why Delaware class counsel would have any interest other than maximizing the class recovery. Finally, respondents cannot assail the level of detail in the Delaware record -- which the Delaware Supreme Court concluded was entirely adequate -- without "asserting [their] own failure to raise matters clearly within the scope of a prior proceeding." *Underwriters Nat'l Assurance Co.*, 455 U.S. at 710.

class members have the capacity to protect their own interests and are responsible for their own decisions. *See* Pet. Br. at 21-23; *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2707 (1994); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 200 (3d Cir. 1993); *Thompson*, 992 F.2d at 190 n.4; 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* § 1768, at 362-63 (1986).[10]

Finally, relying on *Prezant v. De Angelis*, 636 A.2d 915 (Del. 1994), respondents contend that *under Delaware law* a class member's failure to opt out does not constitute effective consent to a settlement negotiated by a duly constituted class representative. Respondents' assertion that the settlement did not comport with *Delaware* law (Resp. Br. at 37) must fail because the determinations they challenge were affirmed by the final judgment of the *Delaware* Supreme Court. *See Wainright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the State's highest court with respect to state law are binding on the federal courts"); *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 917 (11th Cir. 1995) ("'a state's highest court is the one true and final arbiter of state law'") (citation omitted).

In any event, respondents' misinterpretation of *Prezant* cannot be reconciled with *Shutts*. *See* Pet. Br. at 21-23. *Prezant* announced a Delaware rule requiring that, when

[10] Respondents suggest that it is unclear whether any Delaware class representative held federal claims. Resp. Br. at 36 n.45. The Ninth Circuit did not predicate its decision on this factually incorrect suggestion, however, and this Court should decline to address it. *See Peralta*, 485 U.S. at 86; *Capital Cities*, 467 U.S. at 697. In any event, the court-approved settlement notice rebuts this suggestion, as it expressly states that the settlement consideration would be paid *only* to members of the class whose shares were purchased in the tender offer or were cashed out or converted pursuant to the merger. *See* Pet. App. 93a. If a class is in *fact* adequately represented despite a potential conflict, due process is satisfied. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *In re Chicken Antitrust Litig.*, 669 F.2d 228, 236-37 (5th Cir. 1982); *Reynolds v. National Football League*, 584 F.2d 280, 285-86 (8th Cir. 1978).

adequacy of class representation is challenged, the court must articulate its findings regarding the satisfaction of the Rule 23 criteria "in order to facilitate possible appellate review." 636 A.2d at 925. The Chancery Court here fully complied with these requirements. The objectors to the settlement argued that the class representation was inadequate because the class representatives colluded with defendants' counsel to "sell out" the federal claims. Pet. App. 70a. The Chancery Court opinion specifically considered and rejected this contention. *Id.* The Chancery Court also determined by order that the suit was properly maintained as a class action and that the named plaintiffs were appropriate representatives:

> it is hereby further determined that the plaintiffs in the Actions, as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class and that the maintenance of this action as a class action meets all the requirements of Rule 23(a) and (b)(3) of the Court of Chancery.

J.A. 204-05. The Delaware Supreme Court affirmed this ruling. Due process requires no more. The determination of adequate representation is a classic example of a finding entitled to preclusive effect under the Full Faith and Credit Act. *Grimes*, 17 F.3d at 1562; *Nottingham*, 925 F.2d at 32.

* * *

Class action settlements have enabled federal and state courts to oversee the resolution of increasingly complex litigations involving securities, asbestos, medical devices, herbicides, and pharmaceuticals.[11] Absent an effective class

[11] *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 738-39 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993); *In re Drexel Burnham Lambert*, 960 F.2d at 291-92; *In re A.H. Robins Co.*, 880 F.2d 709, 741 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *Georgine*, 157 F.R.D. at 338; *In re Silicone Gel Breast Implant Prod. Liab. Litig.*, No. 94-P-11558-S, 1994 WL 578353, at *1 (N.D. Ala. Sept. 1, 1994).

action mechanism that can finally and conclusively resolve claims of multiple litigants, such cases may exceed the capacity of our courts.[12] The Ninth Circuit's decision will proliferate class actions involving the same parties in multiple forums -- a disturbing result from the standpoint of judicial administration. *See* Pet. Br. at 49; *Evans v. Jeff D.*, 475 U.S. 717, 732, 736-37 (1986) (Rule 23 should not be interpreted to "reduc[e] the attractiveness of settlement," with the result of "forcing more cases to trial, unnecessarily burdening the judicial system, and disserving . . . litigants"). The Ninth Circuit's decision also derogates the broad and important authority that courts supervising class actions have historically exercised under Rule 23 and its state analogs. *See Shutts*, 472 U.S. at 810 (noting numerous ways in which "[t]he concern of the typical class-action rules for the absent plaintiffs is manifested").

Respondents' unjustified invocation of the Supremacy Clause and due process concerns reflects the profound distrust of state court judicial processes that underlies the Ninth Circuit's decision. This distrust collides with basic principles of federalism and "this Court's emphatic reaffirmation . . . of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so." *Allen*, 449 U.S. at 105. Satisfying all the requirements of due process, the Delaware Chancery Court exercised the established authority of a state court to approve a settlement providing for the release of all claims arising out of the transaction before it. The Ninth Circuit abrogated this authority in a deeply flawed decision that cannot be upheld without

[12] *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 750 (E. & S.D.N.Y. 1991) ("[t]he large number of asbestos lawsuits pending throughout the country threatens to overwhelm the courts and deprive all litigants, in asbestos suits as well as other civil cases, of meaningful resolution of their claims"), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993); *In re "Bendectin" Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.3 (S.D. Ohio) (existing Bendectin docket alone would require 105 "Judge years" to try), *mandamus granted on other grounds*, 749 F.2d 300 (6th Cir. 1984).

reducing state judicial systems to secondary institutions and depriving parties of the much needed opportunity for global settlement of complex litigation. *See* Pet. Br. at 45-50; *cf. Wood v. Bartholomew*, No. 94-1419, 1995 WL 592508, at *4 (U.S. Oct. 10, 1995) (noting the need for federal courts to avoid upsetting "the proper delicate balance between the federal courts and the States").

CONCLUSION

For all of the foregoing reasons, and the reasons stated in petitioners' opening brief, the judgment of the Ninth Circuit Court of Appeals should be reversed. The case should be remanded with instructions to dismiss the complaints with prejudice as to those plaintiffs who failed to opt out of the Delaware settlement.

October 16, 1995

Respectfully submitted,

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No. 94-1809

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.
and MATSUSHITA HOLDING CORPORATION,
Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IN THE
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MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.
and MATSUSHITA HOLDING CORPORATION,
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On Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.3 of the Rules of this Court, the Washington Legal Foundation and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. *Amici* have not contacted counsel for Respondent Walter Minton. Counsel for Respondents Lawrence Epstein, *et al.*, declined

to consent to the filing of the brief, thereby necessitating the filing of this motion.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system and to ensuring that economic development is not impeded by excessive litigation. To that end, WLF has appeared before this Court as well as other federal and state courts in cases affecting the scope of the federal securities laws (*see, e.g., Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)) as well as in cases raising tort reform issues. *See, e.g., BMW of North America, Inc. v. Gore*, No. 94-896, *cert. granted*, 115 S. Ct. 932 (1995); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* before this Court in a number of cases of interest to the business community.

Amici are concerned by the proliferation of class-action lawsuits being filed under the federal securities laws and the inhibiting effect that such suits can have on the development of new businesses. *Amici* believe that the decision of the Ninth Circuit in this case, if allowed to stand, will exacerbate that trend by encouraging the filing of multiple class-action suits arising from a single business transaction. Multiple suits would tax the resources of the

federal courts, would provide no benefit to aggrieved shareholders, and would be a severe economic drain to the business community. The only group that stands to benefit from the Ninth Circuit's decision is the plaintiffs' bar, a group that has fared well even in the absence of multiple class-action suits.

WLF and AEF seek to file the attached brief because of their interest in promoting the welfare of the business community and the public at large; they have no direct interest in the outcome of this lawsuit or of other suits raising similar issues. Because of their lack of direct economic interests, *amici* believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, *amici curiae* WLF and AEF respectfully request that they be allowed to participate in this case by filing the attached brief.

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August 3, 1995

QUESTION PRESENTED

Whether a federal court can withhold full faith and credit from a state court final judgment approving a class action settlement simply because the settlement released federal claims.

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IN THE
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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate by reference the Statement of the Case contained in Petitioners' brief.

In brief, this case concerns Matsushita Electric Industrial Co., Ltd.'s ("Matsushita") 1990 acquisition of MCA, Inc. through a tender offer of $66 per share of common stock. Respondents assert that Matsushita violated federal securities law by paying a premium price for shares belonging to two senior MCA officials -- MCA founder Lew Wasserman and MCA chief operating officer Sidney Sheinberg.

At approximately the same time as the tender offer, Matsushita separately acquired the shares of Mr. Wasserman in exchange for preferred stock in an entity known as MEA Holdings.[1] Mr. Sheinberg tendered his 1.2 million shares of MCA common stock in accordance with the terms of Matsushita's public tender offer. However, shortly after Matsushita accepted his shares, *MCA* (not Matsushita) paid him $21 million as compensation for his agreement to continue working for MCA despite the change in corporate control, for relinquishing his right to collect salary without performing future services, and for loss of a promised stock option bonus. Petition Appendix ("Pet. App.") 51a.

Respondents contend that Matsushita violated federal securities law by acquiring the Wasserman and Sheinberg shares on terms more favorable to those two insiders than were available to other MCA shareholders. Respondents contend (and Petitioners deny) that the $21 million payment from MCA to Mr. Sheinberg was actually a disguised

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[1] Matsushita acquired the Wasserman shares in this manner so that Mr. Wasserman could avoid recognition of capital gains on his shares. The transaction was structured with the intent that the preferred stock received by Mr. Wasserman be no more valuable than the tender offer consideration.

premium on the purchase price of Mr. Sheinberg's MCA stock, designed to induce him to tender his shares.

The Matsushita tender offer for MCA spawned several class-actions lawsuits, purportedly on behalf of a class consisting of all MCA shareholders. Three such class actions (subsequently consolidated) were filed in the Delaware Court of Chancery in September 1990. Plaintiffs in the Delaware proceedings raised three claims under Delaware law: (1) MCA directors breached their fiduciary duty of care by failing to take steps to maximize shareholder value upon a change of corporate control; (2) they breached their duty of candor by failing to disclose the compensation packages offered to MCA officers under the terms of the merger agreement; and (3) they breached their fiduciary duty of loyalty by making preferential arrangements for themselves as part of the tender offer. Pet. App. 35a-36a.

The instant shareholder lawsuits were filed in the U.S. District Court for the Central District of California, beginning in December 1990. One was filed by Respondent Walter Minton in his individual capacity; the other was filed by Respondent Lawrence Epstein and six other individuals (the "Epstein Respondents"), purportedly on behalf of all MCA shareholders at the time of the tender offer. The suits (later consolidated) alleged that Matsushita's tender offer violated SEC Rule 14d-10, 17 C.F.R. § 240.14d-10, which requires equal consideration for all

stock purchases made "during a tender offer."[2]

The district court denied a motion for class certification in April 1991. It granted summary judgment for Matsushita and dismissed the federal complaints on April 15, 1992. Pet. App. 45a-61a.

While Respondents' appeals from that dismissal were pending, Matsushita entered into a settlement agreement in the Delaware class action. In return for release of all claims arising out of its acquisition of MCA, Matsushita agreed to a $2,000,000 payment to former MCA shareholders. The settlement provided all shareholders with the right to opt out of the settlement.

The Delaware Chancery Court certified a class for settlement purposes and (pursuant to Del. Ch. Ct. R. 23(e)) required that notice of the proposed settlement be sent to all former MCA shareholders. The notice made clear that shareholders were entitled to opt out of the settlement, and that the settlement would release all state and federal claims arising out of the MCA tender offer, including the Rule

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[2] Rule 14d-10 provides in relevant part:

(a) No bidder shall make a tender offer unless:
(1) The tender offer is open to all security holders of the class of securities subject to the tender offer, and

(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

17 C.F.R. § 240.14d-10(a). Matsushita contends that all payments made to Mr. Wasserman were made *after*, not "during," its tender offer for MCA shares. Matsushita Certiorari Petition at 21-24.

14d-10 claims pending in the California litigation. Pet. App. 77a-101a.

Only 19 of the more than 10,000 shareholders elected to opt out of the settlement. Those 19 included Respondent Minton but did *not* include any of the Epstein Respondents other than Respondent Rockford. No named Respondent appeared in the Delaware Chancery Court to object to the class settlement.

The Delaware Chancery Court then examined the settlement, determined that it was "fair and reasonable" in all respects, and entered a judgment releasing all claims (including Rule 14d-10 claims) of those who had not opted out of the class. Pet. App. 63a-75a. It specifically found that the former MCA shareholders had been adequately represented in the Delaware proceedings and that the settlement amount was a reasonable approximation of the value of the claims being released. *Id.* On appeal, the Delaware Supreme Court affirmed the Chancery Court opinion in September 1993. Pet. App. 76a.

Only after the Delaware proceedings were concluded did the Ninth Circuit issue its decision in this case. On February 27, 1995, the Ninth Circuit issued an opinion reversing the district court's grant of summary judgment for Matsushita, ordering that summary judgment be entered for Respondents with respect to the Wasserman stock purchase, and remanding the case to the district court for a determination of damages. The Ninth Circuit acknowledged that the Delaware courts had explicitly released the claims being asserted by Respondent but asserted that the release was not entitled to full faith and credit because the Delaware courts lacked jurisdiction to issue such a release. Pet. App. 24a-40a. The Ninth Circuit also rejected the

reasoning employed by the district court in granting summary judgment to Matsushita.[3]

The Court granted Matsushita's certiorari petition on June 19, 1995, to review the Ninth Circuit's ruling that the Delaware settlement decree was not entitled to full faith and credit.

SUMMARY OF ARGUMENT

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires the federal courts to give the same preclusive effect to the Delaware judgment as would the Delaware courts. The Delaware courts have made abundantly clear that they would bar further litigation of Respondents' Rule 14d-10 claims. Accordingly, § 1738 requires dismissal of those claims in the absence of any evidence that Congress intended a partial repeal of § 1738 in connection with federal securities law claims.

The preclusive effect of the Delaware judgment is not affected by its status as a class action. Delaware complied fully with the requirements of the Due Process Clause before purporting to bind absent plaintiffs to its judgment. Such compliance is all that is necessary to entitle a class action judgment to full faith and credit under § 1738.

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[3] The Ninth Circuit disagreed with the district court's holding that Congress had not intended to permit private enforcement of Rule 14d-10. Pet. App. 4a-11a. The Ninth Circuit also disagreed with the district court's holding that the Wasserman transaction did not violate Rule 14d-10 because it did not occur "during" the tender offer period (Pet. App. 11a-20a); the Ninth Circuit held that the term "tender offer" as used in Rule 14d-10 should not be "interpreted to denote a rigid period of time." Pet. App. 15a.

Adopting the Ninth Circuit's decision in this case is likely to have significant adverse effects on litigation in the federal courts. It is likely to increase transactional costs associated with securities law class actions, increase the likelihood that corporations will face multiple class actions arising from the same transaction, and decrease the willingness of defendants to settle class actions.

ARGUMENT

I. § 1738 REQUIRES THE FEDERAL COURTS TO GIVE FULL FAITH AND CREDIT TO THE JUDGMENT OF THE DELAWARE COURTS

Respondents do not deny that the Delaware courts explicitly released the Rule 14d-10 claims that they are pressing in this case, except with respect to those shareholders who opted out of the Delaware settlement. Nor do they deny that shareholders were given notice that the proposed settlement intended to release such claims, that shareholders were told that they could opt out of the Delaware settlement if they wanted to preserve their Rule 14d-10 claims, and that the Delaware courts approved the settlement only after scrutinizing it for fairness and reasonableness and determining that the class was adequately represented. Under those circumstances, federal law required the Ninth Circuit to give full faith and credit to the Delaware court judgment.

The Full Faith and Credit Act, 28 U.S.C. § 1738, "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). In determining whether an earlier state

judgment bars subsequent litigation in the courts of that state, a federal court should "rely in the first instance on [that] state['s] preclusion principles." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985). If under "state preclusion principles" the earlier state judgment would bar subsequent litigation, § 1738 requires the federal court to enforce those rules "unless a later statute contains an express or implied partial repeal." *Kremer,* 456 U.S. at 468. This approach to enforcement of § 1738 is to be followed even in, as here, "a lawsuit involving a claim within the exclusive jurisdiction of the federal courts." *Marrese*, 470 U.S. at 381.

There is no doubt that, under Delaware preclusion principles, the Delaware settlement bars subsequent litigation of Respondents' Rule 14d-10 claims. Indeed, the settlement agreement explicitly approved by the Delaware Chancery Court states as much, and the Delaware Supreme Court affirmed the Chancery Court's decision. Thus, under *Kremer/Marrese,* continued litigation of the Rule 14d-10 claims is barred by § 1738 in the absence of a later statute containing an express of implied partial repeal.

There is no such partial repeal in this case. Respondents have pointed to no language in the Williams Act, 82 Stat. 454, that could even arguably qualify as an express repeal. With respect to implied repeals, the Court made clear in *Kremer* that it would not lightly find implied partial repeals of § 1738 because "'It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored.'" *Kremer*, 456 U.S. at 468 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). *Kremer* spelled out the limited conditions under which the Court was willing to find implied partial repeals of § 1738:

> There are, however, "two well-settled categories of repeals by implication -- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest."

Kremer, 456 U.S. at 468 (quoting *Radzanower*, 426 U.S. at 154).

The relationship of § 1738 to the Williams Act (the source of the Securities and Exchange Commission's authority to issue Rule 14d-10) does not fall within either of these categories. There is no conflict -- irreconcilable or otherwise -- between § 1738 and the Williams Act. Nor can it be said that the Williams Act "covers the whole subject" of § 1738, since the Williams Act is silent regarding the preclusive effect to be given state court judgments in subsequent federal court actions.

It is, of course, true that federal law grants "exclusive jurisdiction" to the federal courts to hear claims alleging violations of the Williams Act "or the rules and regulations thereunder." 15 U.S.C. § 78aa. But the existence of exclusive federal jurisdiction has never been thought to create a conflict between § 1738 and the statute granting such jurisdiction. Indeed, in *Kremer*, the Court found no conflict between § 1738 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, while at the same time leaving unanswered the issue of whether exclusive jurisdiction over Title VII claims lies in the federal courts. *Kremer*, 456 U.S. at 479 n.20. *See also, Marrese,*

470 U.S. at 380 ("Our decisions indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts."). A federal statute granting the federal courts exclusive jurisdiction over certain types of claims may indicate the forum in which such claims are to be tried if they are to be tried at all, but is says nothing about Congress's intent with respect to whether prior state court judgments can have preclusive effect on such claims.

In refusing to give full faith and credit to the Delaware judgment, the Ninth Circuit ignored these well-settled principles regarding § 1738. Instead, citing *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accidental Health Ins. Gty. Ass'n*, 455 U.S. 691 (1982); and *Durfee v. Duke*, 375 U.S. 106 (1963), the Ninth Circuit held that the "general rule" established by *Kremer* does not apply if "the state court 'did not have jurisdiction over the subject matter or the relevant parties.'" Pet. App. 28a (quoting *Underwriters,* 455 U.S. at 704-05).

The Ninth Circuit has simply misread *Underwriters* and *Durfee*. Far from countenancing wholesale collateral attacks on judgments based on alleged lack of jurisdiction, the Court stated categorically in *Underwriters*:

> This Court has long recognized that "[the] principles of res judicata apply to questions of jurisdiction as well as to other issues." *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932). *See also Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939); *Davis v. Davis*, 305 U.S. 32 (1938). Any doubt about this proposition was definitively laid to rest in *Durfee v. Duke, supra,* at 11, where this Court held that "a judgment is entitled to full faith and credit -- even as to

> questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." The North Carolina courts, therefore, should have determined in the first instance whether the Rehabilitation Court [the Indiana court whose judgment was being collaterally attacked] fully and fairly considered the question of subject matter jurisdiction over the North Carolina deposit, with respect to pre-rehabilitation claims of the parties before it. If the matter was fully considered and finally determined in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts.

Underwriters, 455 U.S. at 706-07.

Respondents do not dispute that the Delaware Chancery Court notified shareholders that the proposed settlement would release all Rule 14(d)-10 claims, invited shareholders (including Respondents) to contest the proposed settlement, and satisfied itself that it did have jurisdiction before entering its judgment. Accordingly, the Ninth Circuit is bound by the Delaware court's determination regarding jurisdiction.

The Ninth Circuit, while conceding that the Delaware court "determined that it was jurisdictionally competent to enter a judgment settling the class action" (Pet. App. 28a n.25), based its refusal to grant full faith and credit to the Delaware judgment on vague references in *Durfee* (not repeated in *Underwriters*) to the possibility that there may be exceptions to the rule against collateral attack on a state court's jurisdictional determinations. The appeals court said, "In this case the policy of finality of judgments is

plainly outweighed by the federal interest in reviewing a state court's exercise of judicial power over claims which Congress has vested exclusively in federal courts." *Id.* That assertion not only effectively eviscerates the rule against collateral attack but also ignores *Marrese*'s plain statement that "a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." *Marrese*, 470 U.S. at 380.[4]

In sum, the Ninth Circuit's refusal to give full faith and credit to the Delaware judgment was a clear violation of § 1738.

II. THE DELAWARE JUDGMENT IS NO LESS ENTITLED TO FULL FAITH AND CREDIT SIMPLY BECAUSE IT AROSE IN CONNECTION WITH A CLASS ACTION

The Delaware Chancery Court's judgment purported to bind a class of all former MCA shareholders. But nothing in *Marrese* or *Kremer* suggests that a state court judgment entered in a class action is any less entitled to full faith and

[4] The Second Circuit case cited by the Ninth Circuit in support of its assertion actually undercuts the assertion. Applying *Kremer*, the Second Circuit held in *Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985), that the federal securities laws do not expressly or impliedly repeal § 1738. *Murphy* stated that the federal court's exclusive jurisdiction over federal security law claims evinced a congressional interest in uniform interpretation of those laws *(id.)*, but a holding that a federal securities law claim is barred by a prior state court settlement cannot possibly lead to non-uniform interpretation of securities law.

credit under § 1738 than is a judgment entered in a non-class action.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), sets forth the constitutional limitations on a state court's power, in the course of class-action litigation, to adjudicate the claim of a plaintiff who has not appeared in the action. The Court held that the Due Process Clause demands that, if the forum state wishes to bind absent plaintiffs concerning "a claim for money damages or similar relief at law," the absent plaintiffs must be afforded the following protections:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane [v. Central Hanover Bank & Trust Co.]*, 339 U.S. [306,] 314-315 [1950]. . . . The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.

Phillips Petroleum, 472 U.S. at 812-13.

The Delaware court provided MCA shareholders with all the procedural protections demanded by *Phillips*

Petroleum. The court provided all shareholders (including Respondents) with notice of the proceedings (including a description of the action and the shareholders' rights in it) and an opportunity to be heard; it provided objecting shareholders with an opportunity to opt out of the proceedings; and (before it approved the settlement) it satisfied itself that the named plaintiffs adequately represented the interests of absent shareholders. Given the Delaware court's compliance with all the due process requirements imposed by *Phillips Petroleum*, there is simply no reason not to apply § 1738 in this case

In their brief opposing review by this Court, the Epstein Respondents repeatedly asserted the inadequacy of class representation in the Delaware proceedings. *See, e.g.*, Epstein Respondents' Opposition Brief at 21. They asserted the right to raise the adequacy of representation issue on collateral review:

> As noted, respondents did not appear in Delaware. Since *Hansberry v. Lee*, 311 U.S. 32 (1940), it has been clear that collateral attack on inadequate representation is proper in these circumstances.

Id. at 21 n.21.

The Epstein Respondents are simply wrong regarding their claimed right to raise the adequacy of representation issue in the federal courts. *Underwriters* makes clear that if they wanted to allege inadequate representation, they should have done so in the Delaware Chancery Court in connection with that court's "full and fair" consideration of the issue. *Hansberry v. Lee* is not to the contrary. *Hansberry* stands for the limited proposition that a litigant may collaterally attack a prior class action judgment where she

did not receive adequate notice that the judgment was intended to be binding on her. *Hansberry*, 311 U.S. at 40. Federal courts have consistently read *Hansberry* in this limited fashion and have declined to interpret it as permitting wholesale collateral attacks on adequacy of representation determinations. *See, e.g., Smith v. Allegheny Corp.*, 394 F.2d 381, 391 (2d Cir. 1968); *O'Burn v. Shapp*, 70 F.R.D. 549, 552 (E.D.Pa. 1976).

The Ninth Circuit was unwilling to concede that a state court judgment could *ever* operate to bar subsequent federal court adjudication of an exclusively federal claim. The Ninth Circuit nonetheless attempted to distinguish contrary decisions from the First and Third Circuits (*Nottingham Partner v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994)) by asserting that in those cases "the state and federal claims arose out of the identical factual predicate." Pet. App. 33a. Those two cases are not distinguishable on that basis, because the factual overlap between state and federal claims is at least as great here as it was in those cases.[5] More important, however, is the irrelevancy of factual overlap in deter-

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[5] In this case, the Delaware plaintiffs asserted a claim that the defendants breached their fiduciary duty of loyalty by making preferential arrangements for themselves as part of the tender offer -- a claim based on facts virtually identical to the facts underlying Respondents' Rule 14d-10 claim. The Ninth Circuit attempted to downplay the significance of that factual overlap by asserting that the Delaware claim had no basis in Delaware law. Pet. App. 36a. We find it remarkable that the Ninth Circuit bases its refusal to extend full faith and credit to the Delaware judgment on its own interpretation of Delaware law. Moreover, the strength or weakness of various claims raised in the Delaware and federal actions has no bearing on whether an overlap of factual claims actually exists.

mining whether § 1738 is applicable. One cannot seriously dispute the reasonableness of attempting to settle all possible shareholder claims arising from the MCA tender offer when settling a shareholder class action arising in connection with that tender offer. So long as there was any reasonable basis for the Delaware court to conclude that it had jurisdiction to approve a settlement covering the Rule 14d-10 claims -- and *Marrese, Kremer,* and *Phillips Petroleum* suggest that such a conclusion was eminently reasonable -- § 1738 required the Ninth Circuit to give full faith and credit to the Delaware judgment.

Indeed, the Ninth Circuit is the *only* federal appeals court that has indicated an unwillingness to apply § 1738 to the facts of this case. Contrary to the Ninth Circuit's contention, its decision is not supported by the Second Circuit's decision in *National Super Spuds v. N.Y. Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). *National Super Spuds* stands for the limited proposition that a class action may not settle claims which the class representatives do not themselves possess. *Id.* at 16. But that is not a concern in this case; the Delaware class representatives possessed precisely the same claims -- including the Rule 14d-10 claim -- as did Respondents.

In sum, the fact that the Delaware judgment involved class claims in no way lessens its entitlement to full faith and credit in the federal courts. Rather than seeking to challenge the Delaware judgment collaterally, the non-opting-out Respondents were required to pursue any challenge to the Delaware Chancery Court judgment "by way of appeal through the state-court system and certiorari from [the U.S. Supreme] Court." *Parsons Steel, Inc. v. First Alabama Bank,* 474 U.S. 518, 525 (1986).

III. THE NINTH CIRCUIT'S DECISION THREATENS TO DISRUPT CLASS ACTION SETTLEMENTS AND TO ENCOURAGE MULTIPLE CLASS ACTION SUITS ARISING FROM A SINGLE SECURITIES LAW TRANSACTION

The number of securities law class actions in the federal courts has increased significantly in recent years. As many securities law class actions were filed between 1990 and 1993 as were filed during the entire decade of the 1980s. Testimony of Marc E. Lackritz to the Senate Banking, Housing and Urban Affairs Committee's Subcommittee on Securities (March 2, 1995). The aggregate damages sought in all such class actions pending at the end of 1993 was nearly $29 billion. *Id.*

There is considerable on-going debate regarding whether securities law class actions are an efficient means of policing the securities markets and whether the transactional costs of such massive litigation exceeds any value produced.[6] Regardless where one comes out on that debate, the magnitude of such litigation ought to give one pause before adopting a rule of law likely to increase such litigation significantly.

That is precisely the result to be expected if the Court affirms the Ninth Circuit's decision. The Ninth Circuit's decision makes it virtually impossible for a corporation to

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[6] In April 6, 1995 testimony before the Subcommittee on Securities, both former SEC Chairman Richard C. Breeden and former SEC Acting Chairman Charles C. Cox spoke in favor of pending legislation to curb perceived excesses in securities law class actions. Such legislation received initial approval from both the House and the Senate in the spring of 1995.

negotiate a class action settlement that will settle all claims arising from a single transaction. Rather, any state court settlement will be subject to attack in the federal courts on the ground that it cannot definitively settle all exclusively federal claims. Since virtually all securities law claims (including those brought under SEC Rule 10b-5) fall within the exclusive jurisdiction of the federal courts, the potential for multiple lawsuits is apparent. Thus, a business seeking to settle all claims would likely need to enter into a federal court settlement covering all exclusively federal claims as well as one or more state-court settlements covering state-law claims. A single federal court settlement may well not be sufficient considering that: (1) a federal court is under no obligation to exercise pendent jurisdiction over state-law claims when an independent basis for jurisdiction over such claims is lacking; (2) states can and do assert that certain state-law claims can only be raised in state courts; and (3) a defendant seeking to settle cannot choose its own forum -- if it has only been sued in state court, its ability to remove the case to federal court before effecting a settlement is quite limited.

A rule that effectively requires defendants to enter into multiple settlements will increase the transaction costs of securities law class actions considerably. Recent studies have suggested that for every dollar awarded to shareholders in securities law class actions, another dollar goes toward litigation costs. J. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 573 (1991). If multiple settlements are to be required in order to settle all claims arising from a single transaction, litigation costs will inevitably consume a larger share of funds.

Alternatively, the Ninth Circuit's decision could decrease the willingness of defendants to settle class claims; such settlements obviously are of less value to a defendant if they cannot provide the defendant with assurance that he can avoid future litigation by entering into a settlement.

Conversely, individual litigants have little cause for complaint if defendants are permitted to settle all class claims in a single lawsuit. Under such a system, all class members are assured that their claims will not be settled except on terms found fair and reasonable by an independent court. If they are unhappy with the class settlement, they are free to opt out and pursue their claims independently. Their net recoveries are likely to be greater when legal fees are minimized due to elimination of multiple lawsuits.

The only group that stands to gain from the Ninth Circuit's decision are the lawyers. Indeed, it is clearly the lawyers who are driving this litigation. If Respondents really had had any strong *personal* objections to the Delaware settlement, one would expect them to have expressed those objections to the Delaware court rather proceeding with a collateral attack on the settlement in the federal courts. Respondents were provided with all the options required by *Phillips Petroleum* when they were given a choice between accepting the Delaware settlement or opting out of the class and proceeding on their own. Nothing in *Phillips Petroleum* suggests that class members are entitled to a third option -- that of opting out of one class so that they can organize their own separate class.

In sum, the Ninth Circuit's decision has nothing to recommend it in terms of public policy. It is likely to lead to the filing of multiple class action suits arising from the

same transaction, and to a decreased willingness of defendants to settle such claims.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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August 3, 1995

Counsel wish to acknowledge the assistance of Catherine Clifton, a third-year student at Texas Tech University Law School, in preparing this brief.

QUESTION PRESENTED

The amicus curiae adopts the statement of the question presented by respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1809

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., and MATSUSHITA HOLDING CORP.,
Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF C. L. GRIMES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

C.L. Grimes files this brief as amicus curiae pursuant to written consents of the petitioners and respondents, which have been lodged with the Clerk.

Amicus Grimes respectfully urges that the decision of the court below in this case be affirmed. It was clearly correct and will go far to suppress the "Delaware settlement," a procedure with a history of abuse and great potential for further abuse.

Grimes's purpose in filing this brief is twofold: to emphasize the "Delaware settlement" as an egregious misuse of class action procedure which should be put to an end, and to invite the Court's attention to certain matters so as to ensure that its opinion affirming the

decision below will not inadvertently appear to decide certain related issues in a way that might undercut the result.

I. INTEREST OF THE AMICUS CURIAE

Amicus Grimes is active in corporate law reform matters, especially in the areas of shareholder democracy; corporate governance; executive over-compensation; and efforts to suppress the "Delaware settlement," whereby legitimate federal securities claims are collusively bargained away by purported "class representatives" in Delaware state court. His perspective is that of a substantial and serious investor, and is distinctly not that of a corporate gadfly, or that of the professional plaintiff who holds nominal shares so as to serve strike-suit lawyers as a class action "representative."[1] He was one of the plaintiffs (and subsequently one of the petitioners for certiorari in this Court) in *Grimes* v. *Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied,* 115 S. Ct. 480 (1994) (No. 93-2098), which is a prominent case in the relevant area of the law and was relied on by petitioners herein as presenting a conflict with the decision below in this case. He was also an objector to the "Delaware settlement" in the corresponding Delaware state proceeding and a petitioner for certiorari therein. *In re Vitalink Communications Corporation Shareholders Litigation*, [1991-92 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,585 (1991), *affd. sub nom. Grimes* v. *John P. McCarthy Profit Sharing Plan*, 610 A.2d 725, *cert. denied,* 113 S. Ct. 179 (1992) (No. 92-13).

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[1] For example, in the Vitalink litigation discussed herein, Grimes was the owner of 200,000 shares, worth $2.1 million even at the tender offer price.

II. SUMMARY OF ARGUMENT

The "Delaware settlement," under which a defendant or potential defendant can buy immunity from federal securities liability by procuring a release (for nominal consideration plus a generous attorney's fee) from a purported "class representative" in a state court class action alleging breach of Delaware law, is an abuse which should be ended by this Court.

In addition, in addressing the questions presented by the case at bar, the Court should be aware of several questionable determinations by the Third Circuit in *Grimes* v. *Vitalink*. These included a holding that a federal Exchange Act disclosure action involves the same factual issues as does a Delaware state breach of fiduciary duty claim, so that disposition of the latter produces issue preclusion as to the former; a holding that a class member who merely objects at the settlement hearing that the class representative is giving away, for an inadequate consideration, valuable claims which had not even been raised in the action, has thereby conducted an issue-precluding "litigation" of those claims; and a holding that a non-resident stockholder in a Delaware corporation who tenders his stock in a tender offer thereby submits to the jurisdiction of Delaware to appoint a non-opt-out class representative empowered to release his exclusively federal claims. None of these issues needs to be addressed in deciding the case at bar, but the Court should be aware of them so as to be alert not to give the appearance of having given its imprimatur to the Third Circuit's disposition of them.

III. ARGUMENT

A. The "Delaware Settlement" Is a Major Abuse of Class Action Procedure Which Should Be Ended by This Court.

Last year, the Chairman of the SEC voiced "concerns about private securities litigation and the role it plays in the vital process of capital formation." *Remarks by Chairman, Arthur Leavitt . . . Securities Regulation Institute, U. of Calif. San Diego, January 26, 1994*, at 2. Among "indications that our current system is flawed," he mentioned that "virtually all securities class actions are settled for some fraction of the claimed damages, and some allege that settlements often fail to reflect the underlying merits of the cases." *Id.* at 3. He criticized law firms' "maintaining an inventory of shareholders to serve as nominal plaintiffs in class action filings," and expressed his "especial[ ] interest[ ] in ways to give shareholders greater control over their own litigation and curb potential conflicts of interest between class action lawyers and the shareholders they represent." *Id.* at 6.

A major target of these strictures is the "Delaware settlement," which has become, like the "Nevada divorce," a classic abuse that brings scorn on the legal system. Holding in readiness a stable of clients who own stock–often, it seems, in only trivial amounts–in nearly every publicly traded company, a relatively small number of lawyers scrutinize the business news, and immediately upon sighting a transaction that might be vulnerable to a claim of breach of duty by a company's directors, file a class action–usually a non-opt-out class action in equity–against the company in state court under state law. (See the description of various practices in *Garr* v. *U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994).) After minimal discovery, the claim is settled for a cosmetic consideration and a large

attorney's fee. The lawyer–nominally, of course, the "class representative"–gives in return a general release that purports to cover all claims, state and federal, arising out of the transaction. The state court approves the settlement. The only winners, of course, are the lawyers and the defendant companies, who are happy to pay the lawyers generously for a "plenary indulgence" or "vaccination." Substantial stockholders with genuine claims are frozen out.

The legal trade press has long regarded the "Delaware settlement" as, quite simply, a scandal. We respectfully refer the Court in particular to Borden, *The Shareholder Suit Charade: The Wilmington Filers shake down corporations in Delaware, and no one seems to mind*, AMERICAN LAWYER (Dec. 1989) 67. Rather than quote from the text, we ask the Court's indulgence for our reproducing its first page on the following page, on the theory that quoting one picture is worth quoting a thousand words:

Legal scholars have likewise expressed dismay over the phenomenon. "Much like the production of sausage and legislation," Professor John C. Coffee, Jr., of Columbia Law School has written, "the settlement of securities litigation is a process that the high-minded are best advised not to examine too closely." Coffee, *Suspect Settlements in Securities Litigation*, NEW YORK

LAW JOURNAL, March 28, 1991, p. 5 col. 1. At least two major studies corroborate what Professor Coffee described as the long-available anecdotal evidence that "the result can be collusive settlements in which low recoveries are exchanged for high plaintiffs' attorneys fees." *Ibid.* In one, Professor Roberta Romano of Yale studied 83 settlements of stockholder actions and confirmed, among other things, that attorneys' fees loomed far larger than plaintiffs' recoveries. In settlements that afforded only structural relief, the value of such relief, she concluded, was "inconsequential." Romano, *The Shareholder Suit: Litigation Without Foundation?*, cited in Coffee, *Suspect Settlements, supra.* Another study, by Professor Janet Cooper Alexander of Stanford Law School, demonstrated that "the strength of the plaintiffs' case on the merits did not appear to be a significant factor in determining the outcome." Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STANFORD L. REV. 497, 500 (1991).[2]

The general press is likewise well aware of the scandal. See, *e.g.*, Coffee, *The Corruption of the Class Action*, WALL ST. JOURNAL, Sept. 7, 1994, p. A15. "*Millions for Us, Pennies for You*," trumpeted a headline in the *New York Times* in late 1993, with the

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[2] See also, *e.g.*, Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714-20 (1986); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. (Summer 1985) 5, 26-33; Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 232-33, 239-46 (1983). See also *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs*, S. HRG. 103-431, 103D CONG., 1ST SESS. 44-46, 117, 305-307, 416-417, 458, 461-62, 602 (1993).

subhead: "*Suits on behalf of investors enrich lawyers. But what of their clients*?" NEW YORK TIMES, December 19, 1993, Section 3, p. 1. ("[T]he law firms representing these investors can win approval for settlements of a few cents on the dollar for their clients while pocketing millions of dollars–even tens of millions–for themselves. . . .' The only people who make money in these are the claimants' lawyers, and the defendants themselves, who shut off a lot of potential liability.' . . . 'The lawyers' interest shifts from protecting the investor to protecting the deal.'") See also Moses, *Off to Court: Lawyer Given To Filing Shareholder Lawsuits Comes Under Scrutiny,* WALL ST. JOURNAL, October 28, 1992, p. 1, col. 8.

The practice of maintaining a stable of stockholders from which plaintiffs could be "pressed into service at the drop of certain stock prices" received general publicity as a result of *Greenfield* v. *U.S. Healthcare, Inc.*, 146 F.R.D. 118 (E.D. Pa. 1993), *affd. sub nom. Garr* v. *U.S. Healthcare, Inc.*, 22 F.3d 1274 (3d Cir. 1994). See, *e.g.*, Moses, *Three Shareholder Lawyers Sanctioned,* WALL ST. JOURNAL, February 5, 1993, p. B7, col. 1.

According to an industry newsletter, in 1993 the eleven law firms involved in the greatest number of settlements of stockholder class-action lawsuits were in an average of 18.5 such settlements each, or one every three weeks. The top firm was involved in 40 such settlements, and the runner-up in 26. Bowers & Gupta, *Shareholder Suits Beset More Small Companies,* WALL ST. JOURNAL, March 9, 1994, p. B1 col. 5.

Adverse public attention to class action settlements is not, of course, restricted to securities cases. See, *e.g.*, a lead editorial headed "*Coupon Clipping for Lawyers*" in the WALL STREET JOURNAL, November 18, 1993, p. A20 col. 1 ("[W]e have a hard time believing the lawyers deserve their money for producing a settlement in

which all the real money goes to the lawyers. . . . Funny, we thought the justice system was supposed to have something to do with, well, justice.") See also Lambert, *Public Interest Law Group Fights Some Class Settlements as Unfair,* WALL ST. JOURNAL, August 17, 1995, p. B4; Baron, *An Asbestos Settlement With a Hidden Agenda,* WALL ST. JOURNAL, May 6, 1993, p. A11, col. 3; Burton, *The Litigator: How Stanley Chesley Settles Things Quickly in Mass-Injury Suits: Class-Action Attorney Earns Big Fees in Settlements Some Say Are Premature,* WALL ST. JOURNAL, June 26, 1992, p. 1, col. 1.

Finally, see generally Judge Becker's scholarly analysis of the potential for abuse of class action settlements in *In re GMC Pick-Up Trucks Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

The key element of the Delaware settlement industry is the ability of the purported class representative to release all claims, *including federal ones.* Otherwise the indulgence is not plenary; and if it is not plenary it will not command much of a price. Professor Coffee eloquently summarized the implications of this at the time of the first case to bless it, Judge Selya's opinion in *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991):

> "[F]or the litigator, the most interesting recent development in securities litigation may be the appearance of *a new technique by which a collusive settlement–that is, a non-adversarial settlement that maximizes the attorney's interest at the expense of the client's*–can be negotiated.
>
> . . . .
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> "Because the general release issued to the defendants in the state court settlement resulted in issue preclusion, the consequence was that no court, state or federal, could hear plaintiffs'

claims of proxy fraud. The seeming paradox in *Nottingham Partners* is that a state court settlement can have preclusive effect despite the fact that the state court lacked subject matter jurisdiction over the claims thereby barred.

"While the legal issue of when one court has the power to approve the release of claims pending in another forum is complex, the practical message to plaintiffs' counsel is much simpler: *weak derivative and class action claims that once would have been routinely dismissed by the Delaware Chancery Court now have an enhanced settlement value, because they can confer immunity with respect to . . . federal securities class actions, which often would have a significant settlement value.*

"Ironically, the incentives for defendants are even clearer: never seek dismissal on the merits of a state class action if a companion federal class action raising related federal claims is possible, but instead reach a settlement in which the defendants are given a general release. If properly structured to fall within the *Nottingham Partners* precedent, such a release will preclude a federal class action raising federal securities claims.

"This type of settlement can be described as 'collusive' because the parties to the state court settlement are effectively depriving absent players–the plaintiffs and their attorneys in the federal action–of their day in court. The net result is effectively both a wealth transfer from the federal plaintiffs' attorneys to the state plaintiffs' attorneys and *a reduction in the total recovery to the class (because the state plaintiffs' attorneys are settling federal claims that they can never win, but can only settle, and should thus accept a lesser settlement than would the federal plaintiffs' attorneys).*

"Although it is still premature to predict that Rule 10b-5 actions will become an endangered species, the possible end result of *Nottingham Partners* will be that the already well-traveled road to the Delaware courts could become a six-lane highway as plaintiffs and defendants rush to settle there before a federal court can stay them."

After pointing out that in the companion state case the Delaware Supreme Court had held that a non-opt-out class was permissible when the action primarily sought equitable relief, Professor Coffee observed:

"... Delaware's approach poses a major hurdle for securities plaintiffs because it is easily manipulated. ...

"... [E]ven plaintiffs who have filed an earlier action for monetary damages in federal court are in trouble, because a Delaware action can always be brought for injunctive relief and will predictably settle quickly in order to be used as a barrier to the federal action."

Coffee, *Suspect Settlements in Securities Litigation, supra* (emphasis added).

The case at bar is an especially cynical example of the use of the "Delaware settlement" to block legitimate federal claims, involving as it does the attempted revival of a state case already determined to be meritless, in order to use its settlement to block a pending federal action.[3]

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[3] Whether the federal action is filed before or after the state action is, of course, irrelevant to the question of the effect of a "Delaware settlement" on the federal action.

B. Three Points Which Amicus Respectfully Suggests the Court Bear in Mind in Formulating Its Opinion in This Case.

In *Grimes* v. *Vitalink, supra,* Grimes encountered several problems in connection with a "Delaware settlement" which this Court should be aware of so that its opinion in this case will not inadvertently give the appearance of approving them.

That case was an Exchange Act class action brought by Grimes and another Vitalink Communications Corporation stockholder, G.W. Holbrook, under Rule 10b-5 and other appropriate provisions, alleging inadequate disclosure of the value of Vitalink stock in connection with management's recommendation that a tender offer for Vitalink's shares be accepted. A non-opt-out Delaware class action arising out of the same transaction (but based on entirely different allegations) had been settled for a sweeping release of all claims a scant few weeks after its initiation, over Grimes's vigorous objections. The district court for the Eastern District of Pennsylvania held that Grimes and Holbrook's federal action was barred by this "Delaware settlement," and the Third Circuit affirmed.

1. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That Breach of Fiduciary Duty Claims Under Delaware State Law Depend on the Same Facts as Do Federal Disclosure Claims.

As noted, the Vitalink litigation involved a tender offer for shares of Vitalink. Promptly upon announcement of the tender offer, various firms prominent at the Delaware plaintiffs' bar filed purported shareholder class actions (later consolidated) charging that Vitalink's management, by the assurance to them of safe jobs with the acquiring company, had

been induced to accede to the acquisition without taking steps to maximize Vitalink's value in the marketplace, thus breaching their fiduciary duties of loyalty and care owed to the stockholders under Delaware law.

The Delaware state court action was based exclusively on management's alleged putting of their own interests first. It was not an action for breach of any duty of disclosure or "candor" and made no allegation of that kind. Aside from the basic story of the tender offer itself, the Delaware action had no factual overlap with a disclosure case such as the federal case subsequently filed by Grimes and Holbrook.[4]

Nevertheless, the Third Circuit said that the federal case before it depended on the "very same set of facts" as had the state case, 17 F.3d at 1564; see also *id.* at 1556, so that disposition of the one disposed of the other by issue preclusion. That the court could make such a statement was inexplicable to us then and remains inexplicable today. This was the basis for one of the questions presented in Grimes and Holbrook's petition for certiorari.[5]

In the case at bar the court below understandably proceeded on the erroneous impression that in *Grimes*

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[4] The allegations of the consolidated complaint in the Delaware action, and of Grimes and Holbrook's complaint in their federal case, are laid side by side in Table 1 at pp. 122a of the Appendix to Grimes and Holbrook's petition for certiorari in No. 93-2098 (hereinafter "App. in No. 93-2098").

[5] "[D]id the court below err in holding . . . [t]hat a state can empower the representative plaintiff in a non-opt-out class action to give a release, binding on all class members, of claims based on a different set of facts from those on which the class action is based?" Petition for Certiorari in No. 93-2098 at ii (Questions Presented, No. 3(c)). See also *id.* at 25-26.

v. *Vitalink* the state and federal cases did indeed depend on the same set of facts, saying that it would "break new ground" for it to give "preclusive effect to a state court judgment that extinguishes exclusively federal claims that are factually unrelated to the state claims pleaded in the class action," and specifically stating that it "need not decide whether to follow *Nottingham Partners* and *Grimes* in giving preclusive effect to a class action settlement that releases exclusively federal claims that turn on the same underlying facts as the state claims." 50 F.3d at 664; see also at 668 n.34.

We respectfully urge the Court to avoid this error in any discussion of *Grimes* v. *Vitalink* in the present case. It would be unfortunate if it could be argued in the future that the Court had placed its imprimatur on the proposition that the issues involved in a Delaware claim for breach of fiduciary duty are so identical with those involved in a federal disclosure claim that disposition of one can extinguish the other by issue preclusion. Circumstances can be imagined in which such a proposition could be used to circumvent a holding in this case designed to restrict abuse of the "Delaware settlement."

2. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That Merely Objecting to a Proposed Class Action Settlement on the Ground That It Releases Claims That Were Never Pleaded Constitutes Issue-Preclusive Litigation of the Underlying Facts of Those Claims.

In the Vitalink litigation, Grimes considered that the settlement agreed to by the "representative" plaintiffs' lawyers was inadequate. In return for what he considered to be only cosmetic changes in the tender offer (plus a fee to the "representative" plaintiffs' lawyers), the sweeping release would purportedly give

up all claims–including disclosure claims under state law and the disclosure claims under federal law that formed the basis for the subsequent federal action, none of which had been either advanced or explored by the "representative" plaintiffs' lawyers. He accordingly appeared at the settlement hearing to oppose approval on this and other grounds.[6]

The settlement hearing was held on written submissions and oral argument, without formal evidence or testimony. This is normal Delaware practice. The court does not decide the merits of the case or of any other claim that may be discussed in evaluating the settlement; rather, it generally evaluates the claims, and balances, based on its *business judgment*, its appraisal of what is being received against its appraisal of what is being given up. *E.g.*, *Barkan* v. *Amsted Industries, Inc.*, 567 A.2d 1279 (Del. Super. 1989); *Rome* v. *Archer*, 564 A.2d 1089 (Del. Super. 1989); *Polk* v. *Good*, 507 A.2d 531 (Del. Super. 1964). The settlement hearing in the Vitalink matter was of this nature, see App. in No. 93-2098 at 54a, 59a-85a, and indeed the state court was explicit that "*it is not necessary for the Court to decide the merits of the case.*" *Id.* at 60a (emphasis added).

Nevertheless, the Third Circuit deemed that by so appearing and objecting, Grimes had "actually litigated" disclosure claims so as to be bound by issue preclusion. It said that the state courts "rejected Mr.

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[6] By way of background, we note that Grimes and the other absent class members had been given neither notice of the class certification nor a chance to protest its non-opt-out feature; nor, just as in the case at bar, was any information ever provided as to who the Delaware "representative" plaintiffs were, whether they were really Vitalink stockholders at all, or whether and why they were representive of the class–even though Delaware law requires such a determination. *Prezant* v. *De Angelis*, 636 A.2d 915, 923-26 (Del. 1994).

Grimes' disclosure claims," 17 F.3d at 1558; that "Grimes pursue[d] the . . . disclosure claims through the Delaware court system," *ibid.*; that "the facts that underlie the federal non-disclosure claims were *actually litigated* during the state court proceeding and were *conclusively resolved* against the objectors," *id.* at 1562 (emphasis added). It held accordingly that this "actual litigation" bound Grimes by issue preclusion.

That the court could make such statements was inexplicable to us then and remains inexplicable today. "Actual litigation" for issue preclusion purposes requires that an issue necessary to the decision be raised, submitted for determination, and actually determined, with opportunity to present evidence and rebut opposing evidence. RESTATEMENT, JUDGMENTS 2D § 27 comment *d*; *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 483-84 (1982); *Halyalker* v. *Board of Regents*, 72 N.Y. 261, 527 N.E.2d 1222, 532 N.Y.S.2d 85 (1988); *James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451, 459 (5th Cir.), *cert. denied*, 404 U.S. 940 (1971); *Eastman* v. *Symonds*, 108 Mass. 567, 569 (1871). A class action settlement hearing is not such a procedure and "is not the procedural stuff from which binding determinations of fact can be drawn." Haudek, *The Settlement and Dismissal of Stockholders' Actions*, 23 Sw. L.J. 765, 809 (1969). This was the basis for another of the questions presented in Grimes and Holbrook's petition for certiorari.[7]

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[7] "At a state court hearing on whether to approve a class action settlement, there is no presentation of evidence or decision on the merits; the court merely generally evaluates, in the light of its business judgment, what the respective sides would give up and receive in the settlement. If at such a hearing a person does no more than argue that the settlement should not be approved because it purports to bargain away substantial claims (including federal claims which were not, and could not have been, presented in the action), has the person thereby 'actually litigated' the facts of those claims, so as to be foreclosed by issue preclusion?" Petition for Certiorari in No. 93-2098 at i (Questions Presented, No. 2). See also *id.* at 21-23.

In the present case the court below understandably proceeded on the erroneous impression that in *Grimes* v. *Vitalink*, quoting the Third Circuit, "the 'facts that underlie the federal non-disclosure claims were actually litigated during the state court proceeding and were conclusively resolved against the objectors, here the federal plaintiffs.'" 50 F.3d at 664.

We respectfully urge the Court to avoid this error in any discussion of *Grimes* v. *Vitalink* in the present case. It would be unfortunate if it could be argued in the future that the Court had placed its imprimatur on the proposition that merely opposing a Delaware settlement constitutes issue-precluding "actual litigation" of the facts of a federal claim. Circumstances can be imagined in which such a proposition could be used to circumvent a holding in this case designed to restrict abuse of the "Delaware settlement."

3. The Court Should Avoid Appearing to Give Its Imprimatur to the Proposition That a Non-Resident's Tender of Stock in a Delaware Corporation Pursuant to a Tender Offer Justifies the Delaware Courts in Forcing Him Into a Non-Opt-Out Class in Which His Federal Rights Can Be Released Without His Consent.

We note finally that in *Grimes* v. *Vitalink*, plaintiff Holbrook (a Connecticut resident) had not appeared in the settlement hearing, so that he could not be charged with having "actually litigated" anything and could not be held bound by the settlement on any prior adjudication theory. The Third Circuit held that he was

bound anyway, on the ground that the Delaware court had personal jurisdiction over him because he had tendered his stock in a Delaware corporation "with knowledge of his status as a member of the plaintiff class in a pending class action lawsuit" containing appropriate procedural protections and had thereby somehow "invoked the benefits and protections of Delaware law." 17 F.3d at 1559-60. This was unintelligible to us then and remains unintelligible today. It was the basis for yet another of the questions presented in Grimes and Holbrook's petition for certiorari.[8] To the extent it is intelligible at all, it is plainly inconsistent with *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), holding that even being a stockholder and an active officer or director in a Delaware corporation is not a "minimum contact" with Delaware for personal jurisdiction purposes. In any event, the question whether and when a state court judgment can be held to foreclose litigation of an exclusively federal claim is not a matter of personal jurisdiction.

We respectfully urge the Court to keep the foregoing in mind in any discussion of *Grimes* v. *Vitalink* in the present case. It would be unfortunate if it could be argued in the future that the Court had placed its imprimatur on this puzzling determination as to personal jurisdiction, which among other things might be deemed to justify forcing a person into a non-opt-out settlement class in which such person's

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[8] "[D]id the court below err in holding . . . [t]hat if a nonresident stockholder in a Delaware corporation sells his stock, in New York, to a third party in response to a tender offer, that is a sufficient 'minimum contact' with Delaware to support personal jurisdiction, at least if there is pending some Delaware state lawsuit, related to the tender offer, in which a class including the stockholder might be certified?" Petition for Certiorari in No.93-2098 at i-ii (Questions Presented, No. 3(a)). See also *id.* at 24-25.

exclusively federal rights might be released notwithstanding the Court's decision in the case at bar–and indeed is fraught with potential mischief in many contexts.[9]

IV. CONCLUSION

The class action device–meant to *help* plaintiffs, not to *hurt* them–has gone off the rails. In particular, the "Delaware settlement" is an embarrassment to the law that should be dealt with by this Court. Its key is the notion that a state court to which Congress has denied any power over federal securities law claims can nevertheless force upon the holder of such a claim an agent authorized to sell it. This Court should affirm the judgment of the court below and take this opportunity to put an end to the abuses of the "Delaware settlement." If in doing so the Court has occasion to refer to the Third Circuit's opinion in *Grimes* v. *Vitalink*, it should be alert not to appear to approve aspects of that opinion that might give the "Delaware settlement" industry means to circumvent the Court's decision.

Respectfully submitted,

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[9] See, *e.g.*, its use in *Pritzker* v. *Yari*, 42 F.3d 53, 62 n.7 (1st Cir. 1994).